Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

_____

_____ Term, 1994

No. _____

_____

GLENN D. THESENVITZ, et al,

Petitioners,

v.

KAISER ENGINEERS HANFORD COMPANY, et al,

Respondents.

_____

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

_____

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36 pp

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UNITED STATES

QUESTIONS PRESENTED FOR REVIEW

1. Can participants and beneficiaries in an ERISA-covered employee benefit pension plan obtain any relief from the administrator of the plan under an ERISA-based federal common law

equitable estoppel theory because of misrepresentations that were made to them by the plan administrator, which they reasonably and irrevocably relied upon to their detriment, concerning the amount of benefits that they were entitled to receive under the plan?

2. Aside from or in concert with the federal common law that is or should be developed under ERISA, do any specific ERISA statutes, such as 29 USC §1132 or 29 USC §1109, give rise to an equitable estoppel claim under ERISA given the factual situation that is presented herein?

PARTIES TO THIS PROCEEDING

Petitioners herein are: Glenn D. Thesenvitz, Kenneth L. Wilson, Donald J. Heberline, James E. Berwick, Donald E. Palmer, Ferrin K. Walker, and Norma

Stark, as PR of the Estate of Lawrence R. Stark (Thesenvitz, et al).

Respondents herein are: Kaiser Engineers Hanford Company, Kaiser Engineers Hanford Company Retirement Plan and The Administrative Committee for Kaiser Engineers Hanford Company Retirement Plan (Kaiser).

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GROUNDS FOR JURISDICTION

The instant Petition was filed with this Court within ninety days of the date upon which the United States Court of Appeals for the Ninth Circuit denied the petitioners' Petition for Rehearing With A Suggestion for Rehearing En Banc, on April 26, 1994, as provided for by the rules of this Court. (See U.S. Supreme Court Rule 13). By means of this Petition, petitioners are seeking review of this denial of their Petition for Rehearing by the Ninth Circuit, as well as review of the underlying February 8, 1994 decision of the Ninth Circuit which reversed and remanded the judgment that had been entered by the U.S. District Court for the Eastern District of Washington in favor of the petitioners herein on July 9, 1992. This Court's

jurisdiction is invoked under 28 USC §1254.

PERTINENT STATUTES

The pertinent portions of ERISA are set forth fully in the Appendix attached hereto, as are the jurisdictional statutes referred to herein.

STATEMENT OF THE CASE

Petitioners based this action upon ERISA (29 USC §1001 et. seq.), and upon the federal common law principles of equitable estoppel that had been developed under ERISA by the 9th Circuit Court of Appeals at the time when this lawsuit was commenced. (See Appendix A, pp. 109-123). The U.S. District Court

for the Eastern District of Washington therefore had jurisdiction over this matter pursuant to 28 USC §1331, and/or 29 USC §1132. (A 108-122; A 17).

Each of the petitioners herein, except for Norma Stark, are former employees of both the Kaiser Engineers Hanford Co. (KEH) and the J.A. Jones Company (Jones). (A 108-122; A 18). Petitioner Norma Stark is bringing the instant lawsuit as the representative of the estate of her deceased husband, Larry Stark, who was otherwise similarly situated to the other plaintiffs herein for the purposes of this lawsuit. (A 108-122; A 16). Future references to "the petitioners" in this brief will be intended to include Mr. Stark and Ms. Stark.

Petitioners' claim in this matter is based upon a set of facts which even the defendants' own witnesses and managers at

trial called "devastating" and "shocking". Petitioners were induced to retire from KEH's employment, at a time when they did not have to do so, by interpretations of KEH's pension plan that were made to them by authorized representatives of the plan administrator. (A 108-122; A 18-24). These interpretations of the KEH pension plan included supplying the petitioners with specific, written statements as to the amount of monthly pension benefits that they would receive under the plan if they chose to take advantage of an early retirement program that KEH was offering only for a limited time. (Id.) Justifiably relying upon the above-described interpretations of the KEH pension plan, the petitioners all agreed to retire from KEH's employment on or before March 31, 1989 as part of this early retirement program. (A 108-122; A

18-24; A 33-37).

In addition to being induced into retiring at a time when they did not have to do so, the petitioners also all detrimentally relied upon the above-described representations that had been made to them by the plan administrator in several other significant respects as well (i.e., they irrevocably chose to receive early Social Security benefits, which permanently reduced the amount of monthly benefits that they would receive during their lifetimes; they made significant purchases in anticipation of a retirement-oriented lifestyle; they moved to different cities, etc.). (Id; A 41).

For over a year after their retirement, the petitioners did in fact receive the amount of monthly pension benefits under KEH's pension plan that they had been promised. (A 108-122; A

23). However, in May of 1990, the petitioners were informed for the first time by the KEH plan administrator that a "mistake" had allegedly been made, and that in order to correct this "mistake", the petitioners' monthly pension benefits under the KEH pension plan were going to be reduced immediately and permanently by as much as $1,000.00 per month. (A 23-24; A 108-122). The source of this mistake allegedly was a miscalculation that had occurred when the benefits that the petitioners had received under the pension plan of a former employer, J.A. Jones, Inc., which had been transferred over to the KEH pension plan when the petitioners became KEH employees, were being determined by the KEH plan administrator in connection with the petitioners' early retirement. (A 12-25). Since May of 1990, the KEH pension plan administrator has in fact

drastically reduced each one of the petitioners' monthly pension benefits under the KEH pension plan as a result of this "mistake". (A 23-24).

District Court Judge Fred Van Sickle determined that the principles of equitable estoppel that were applicable to this matter under the federal common law of ERISA, and that had been enunciated by the Ninth Circuit Court of Appeals as well as by other Courts of Appeals on numerous previous occasions, would not allow the KEH pension plan administrator to deprive the petitioners of the pension plan benefits that they had been promised, which they had been receiving, and which they were counting on. (A 25-47; A 13-14; A 49-51). The Ninth Circuit Court of Appeals reversed, solely on the basis that this Court's recent decision in Mertens v. Hewitt Associates, 508 U.S. _____, 124, L.Ed.2d

161, 1135 S.Ct. 2063 (1993) allegedly prohibited any cause of action utilizing equitable estoppel principles under ERISA from being pursued based upon the circumstances presented herein, without reaching any other issues. (A 2-12). The Ninth Circuit reached this result based upon the decision that it had just rendered in Watkins v. WHC, 17 EBC 1990 (9th Cir., 1993). (A 2-12; A 52-107). This timely Petition has followed.

ARGUMENT

A. CERTIORARI SHOULD BE GRANTED IN THIS INSTANCE IN ORDER TO CLARIFY MERTENS AND BECAUSE OF CONFLICTS AMONG THE CIRCUIT COURTS OF APPEALS ON THIS ISSUE.

As set forth below, some Circuit Courts of Appeals allow federal common law equitable estoppel claims to be

brought under ERISA under some circumstances; some Circuit Courts do not allow such claims to be brought under any circumstances. Amongst those Circuit Courts that do allow ERISA-based equitable estoppel claims to be pursued, there are significant differences of opinion as to when and under what circumstances this can occur, although case law developed in the Eleventh Circuit appears to be emerging as the majority view on this issue. Some of the specific decisions of the various Circuit Courts of Appeals on this issue are set forth below:

Law v. Ernst & Young, 956 F.2d 364 (1st Cir., 1992) (First Circuit applied 11th Circuit's approach to dealing with ERISA-based equitable estoppel claims, without explicitly adopting that approach.)

Lee v. Burkhart, 991 F.2d 1004 (2nd

Cir., 1993) (Second Circuit held that an ERISA-based equitable estoppel claim was available under federal common law of ERISA but only in "extraordinary circumstances" involving affirmative misrepresentations.)

Fischer v. Philadelphia Elec. Co., 994 F.2d 130 (3rd Cir., 1993) (In factual situation remarkably similar to the instant matter, Third Circuit held that relief in the form of equitable estoppel was available under federal common law of ERISA for plaintiffs who had been victims of misrepresentations by representatives of pension plan administrator which plaintiffs had relied upon to their detriment.)

Crosby v. Crosby, 986 F.2d 79 (4th Cir., 1993) (under ERISA, federal courts may develop common law to grant "appropriate equitable relief").

Williams v. Bridgestone/Firestone,

Inc., 954 F.2d. 1070 (5th Cir., 1992) (holds based on earlier decisions that ERISA-based equitable estoppel claim based upon oral misrepresentations is not cognizable, considers but refuses to rule on issue of whether 11th Circuit is correct in holding that ERISA-based equitable estoppel claims are available under other circumstances).

Tregoning v. American Community Mutual Ins. Co., 12 F.3d 79 (6th Cir., 1993); (ERISA-based equitable estoppel claim available under federal common law of contracts and 29 USC §1132(a)(3)(B)); see also Armistead v. Vernitron Corp., 944 F.2d 1287 (6th Cir., 1991) (equitable estoppel relief available under ERISA, even based upon oral misrepresentations that would modify terms of written plan, if actuarial soundness of benefit plan funds would not be impacted by such relief).

Cutting v. Jerome Foods, Inc., 993 F.2d 1293 (7th Cir., 1993) (federal courts have authority to create common law under ERISA but it is uncertain whether common law remedies such as equitable estoppel are available under ERISA); Black v. TIC Investment Corp., 900 F.2d 112 (7th Cir., 1990) (estoppel principles applied to single-employer unfunded welfare plan).

See Slice v. Sons of Norway, 978 F.2d 1045 (8th Cir., 1992) (8th Circuit discusses possible application of equitable estoppel principles to ERISA cases, but declines to rule in that regard because of division on this issue amongst the circuits, and remands to District Court).

Alexander v. Anheuser-Busch Companies, Inc., 990 F.2d 536 (10th Cir., 1993) (coverage of ERISA plan may not be enlarged by informal oral or written

communications under a theory of federal common law estoppel).

Novak v. Irwin Yacht and Marine Corp., 986 F.2d 468 (11th Cir., 1993) (ERISA-based federal common law equitable estoppel claim not available in cases involving "oral amendments to or modifications of employee benefit plans" but is available when authorized representatives of the plan administrator make interpretations of ambiguous language contained in plan documents to plan participants that those participants have detrimentally relied upon; this approach is consistent with pre-Watkins law in the 9th Circuit (see Greany v. Western Farm Bureau Life Ins. Co., 973 F.2d. 812 (9th Cir., 1992) and elsewhere).

To date, the petitioners are not aware of any other court that has held that, as a result of Mertens there can be

no claims made by plan participants for equitable estoppel relief under the federal common law of ERISA. The petitioners believe that this is not surprising, since, in their view, Mertens does not in fact stand for this proposition at all. In fact, several other courts have interpreted Mertens in a far different manner than has the Ninth Circuit. See Anweiler v. American Elec. Power Service Corp., 3 F.3d 986, 993 (7th Cir., 1993) (interprets Mertens as broadening scope of equitable relief available against fiduciaries under ERISA, and in particular, under 29 USC §1132(a)(3)); see also Harris Trust and Sav. Bank v. Salomon Bros., Inc., 832 F.Supp. 1169, 1173 (N.D. Ill., 1993) and Airparts Co. v. Custom Ben. Services of Austin, 828 F.Supp. 870, 875-6 (D. Kan., 1993) (both interpreting Mertens as applying only to claims against non-

fiduciaries, and even then, as not precluding equitable estoppel relief, but rather, as simply preventing recovery of compensatory money damages against such non-fiduciaries under some ERISA provisions; restitution, which can take form of money, and "other equitable relief" still recoverable against both non-fiduciaries and fiduciaries).

B. THE NINTH CIRCUIT HAS MISINTERPRETED MERTENS.

Petitioners respectfully submit that, in Mertens, this Court simply determined that the remedy of compensatory monetary damages was not available to the plaintiffs in that case against an entity that was a non-fiduciary for the purposes of ERISA under the circumstances that were presented therein, and that the Ninth Circuit Court

of Appeals, in holding that Mertens stands for a broader proposition, has misinterpreted this Court's holding in Mertens, a misinterpretation which, if it was allowed to stand unaltered, could wreak havoc upon the many cases involving ERISA-based equitable estoppel-type claims that are currently wending their way through the federal court system. Mertens, supra, at 174.

Moreover, the petitioners also respectfully submit that, in Mertens, this Court also made it clear in dicta that compensatory monetary damages would be available to ERISA plan participants and beneficiaries in appropriate instances when they brought suit against entities that were fiduciaries for the purposes of ERISA:

> " . . . (ERISA) . . . provides that not only the persons named as beneficiaries by a benefit plan . . . but also anyone else who exercises discretionary

> control or authority over the plan's management, administration, or assets . . . is an ERISA 'fiduciary'." Mertens, supra, at 167.
>
> "ERISA . . . defines 'fiduciary' not in terms of a formal trusteeship, but in functional terms of control and authority over the plan . . . thus expanding the universe of persons subject to fiduciary duties - and to damages - under §409(a). . . . (Entities) . . . become liable for damages when they cross the line . . . (and become a) . . . fiduciary . . ." Mertens, supra, at 174.
>
> "All that ERISA has eliminated . . . is the common law's joint and several liability, for all direct and consequential damages suffered by the plan, on the part of persons who had no real power to control what the plan did." (Id).

In the instant matter, the trial court awarded a judgment for the petitioners herein against KEH because of actions which KEH took while KEH was acting in the capacity of plan administrator for the pension plan in question. (A 17; A 37; 40. A review of

the trial court's decision herein also clearly reveals that the trial court considered KEH, as the plan administrator in this instance, to have been acting in the capacity of a "fiduciary" for the purposes of ERISA with respect to the plaintiffs herein, and that KEH did in fact act in that capacity in this instance under the Mertens definition of an ERISA fiduciary. (A 17; A 25; A 29-32; A 37-40). Mertens, supra, at 167, 174.

The petitioners respectfully submit that the trial court's decision in this regard is therefore, if anything, both consistent with and supported by the above-referenced dicta in Mertens, because in this instance the petitioners had obtained a money judgment against an entity (KEH) that was an ERISA "fiduciary" and that had the power to control the actions of the benefit plan

in question herein, and did in fact control those actions in a manner that was extremely detrimental to the petitioners. (Id.) KEH was therefore clearly liable to the petitioners herein under the Mertens dicta referred to above pursuant to ERISA for monetary damages in this instance. Mertens, supra, at 167, 174.

Additionally, petitioners respectfully submit that an examination of this Court's decision in Mertens makes it clear that, if anything, this Court specifically reserved making any ruling upon the particular issue that would be determinative in this case, namely, regarding the question of what sort of equitable remedial relief is available to plan participants under ERISA under circumstances such as those presented herein because the Court did not believe that the parties in Mertens had

adequately addressed the issue. Mertens, supra, at 168-9. Thus, petitioners respectfully submit that the Ninth Circuit clearly misinterpreted Mertens in holding that the Mertens Court did determine whether equitable estoppel relief was available under ERISA under circumstances such as those presented herein. (Id).

However, although petitioners believe that Mertens did not definitively answer this question, guidance from this Court to the Courts of Appeals on this issue is clearly needed, as is evidenced by the large volume of cases on this issue that are currently reaching the Courts of Appeals, and by the diverse determinations that the Courts of Appeals are rendering in those cases, as has been described earlier in this Petition. Petitioners respectfully submit that, by granting certiorari in the instant

matter, the Court could provide that guidance, and could also decide an important question of federal law, and the petitioners respectfully urge the Court to do so. (See U.S. Supreme Court Rule 10(1)(a) and (c)).

C. THE PETITIONERS WERE CLEARLY ENTITLED TO RELIEF HEREIN UNDER PRE-WATKINS NINTH CIRCUIT CASE LAW CONCERNING ERISA-BASED EQUITABLE ESTOPPEL.

At the time when the petitioners commenced this lawsuit, the principal decisions of the Ninth Circuit Court of Appeals which addressed the subject of ERISA-based equitable estoppel claims were Ellenburg v. Brockway, Inc., 763 F.2d 1091 (9th Cir., 1985), Davidian v. Southern California Meat Cutter's Union and Food Employees Benefit Fund, 859 F.2d 134 (9th Cir., 1988), and Dockray v. Phelps Dodge Corp., 801 F.2d 1149 (9th

Cir., 1986).

The Ninth Circuit had held in these decisions that plaintiffs could successfully bring equitable estoppel claims against employee benefit plan administrators pursuant to the federal common law of ERISA as long as they were able to establish the following elements: 1) the party to be estopped knew the facts; 2) the party to be estopped intended that his conduct would be acted on or he acted so that the party asserting the estoppel had a right to believe that he intended his conduct to be acted on; 3) the party asserting the estoppel claim was ignorant of the true facts; and 4) the party asserting the estoppel claim relied on the other party's conduct to his injury. Ellenburg, supra, at 1096; Davidian, supra, at 136; Dockray, supra.

Judge Van Sickle correctly

determined as his well-reasoned opinion contained in the Appendix herein indicates, that the petitioners in this matter had satisfied each of the above-referenced four elements of an ERISA-based federal common law equitable estoppel claim in this instance, and that therefore, they were entitled to receive appropriate relief from defendant KEH in its capacity as the administrator of the pension plan in question. (A 18-40). Judge Van Sickle was also careful to order relief against KEH as the plan administrator rather than against the plan itself in order to avoid impacting the actuarial soundness of the plan. (A 37-40).

While this matter was pending on KEH's appeal to the Ninth Circuit, the Ninth Circuit decided Greany v. Western Farm Bureau Life Ins. Co., 973 F.2d 812 (9th Cir., 1992).

The Greany court took pains to stress that its decision was not meant to alter in any way the existing elements of an ERISA-based federal common law equitable estoppel claim, but rather, was intended simply to add two additional and, at least in the 9th Circuit, new elements to such a claim. Greany, supra, at 822, n. 9.

According to the Greany court, a plaintiff who was seeking to bring an ERISA-based equitable estoppel claim would have to initially establish that: 1) a provision in the governing plan document was ambiguous; and 2) the party to be estopped had interpreted this ambiguity as part of the conduct upon which the equitable estoppel claim was based. (Id). The Greany court specifically indicated that:

> "If these requirements are satisfied, the plaintiff may proceed with the equitable

> estoppel claim by satisfying the precise situational factors set forth in Ellenburg."

(Id).

The Ninth Circuit cited favorably to several decisions of the Eleventh Circuit Court of Appeals in deciding to adopt this revised approach to ERISA-based equitable estoppel claims. Greany, supra, at 821-822.

It is also clear that the petitioners herein were entitled to prevail against KEH in this matter based upon their equitable estoppel claim even under the new Greany standard, because material ambiguities clearly did exist in the governing plan document which was applicable in this instance and because those ambiguities were in fact interpreted by the plan administrator in this instance as part of the conduct giving rise to the petitioners' ERISA-based common law equitable estoppel

claim. (Greany, supra, at 822; A 19-41). Specifically, the plan administrator in this instance interpreted and applied complex plan documents which set forth ambiguously the method by which the petitioners were to receive credit for their prior employment with J.A. Jones, Inc. when their KEH pension plan benefits were being calculated in connection with their early retirements. (A 18-40).

Thus, under pre-Watkins Ninth Circuit case law, the petitioners would clearly have been entitled to prevail in this matter, and it is only the Ninth Circuit's interpretation of this Court's Mertens decision which has prevented the petitioners from doing so to date. The petitioners believe that they are clearly entitled to prevail in this instance under ERISA. If the Ninth Circuit's decision in this matter was allowed to stand, a statutory scheme that was

designed to protect participants in and beneficiaries of employee benefit plans (see 29 USC §1001) would be held to allow in this instance for what could aptly be characterized as a "betrayal without remedy". Therefore, the petitioners respectfully request this Court to grant their Petition for Certiorari in this instance in order to review the Ninth Circuit's interpretation of Mertens, and in order to provide guidance to all of the Circuit Courts of Appeals on the important issue of federal law that is presented herein. (See U.S. Supreme Court Rule 10).

Respectfully submitted:

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(2)

APPENDIX - PART I

Supreme Court, U.S.
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94127 JUL 20 1994

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IN THE

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_____ Term, 1994

No. _____

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Respondents.

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APPENDIX TO
PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE
UNITED STATES

_____

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51 pp

APPENDIX A
Filed May 09, 1994
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 92-36592
CT/AG# CV-91-243-FVS

GLENN D. THESENVITZ, DONALD HEBERLEIN; JAMES E. BERWICK; DONALD E. PALMER; KENNETH L. WILSON; et al

Plaintiffs - Appellees

v.

KAISER ENGINEERS HANFORD CO.

Defendant - Appellant

and

KAISER ENGINEERS HANFORD RETIREMENT PLAN; ADMINISTRATIVE COMMITTEE FOR THE KAISER ENGINEERS HANFORD RETIREMENT PLAN

Defendants

APPEAL FROM the United States District Court for the Eastern District of Washington (Spokane).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Eastern District of Washington (Spokane) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of said District Court in this cause be, and hereby is REVERSED AND REMANDED.

Filed and entered February 8, 1994.

APPENDIX B
Filed: April 26, 1994
NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GLENN D. THESENVITZ; DONALD HEBERLEIN; JAMES E. BERWICK; DONALD E. PALMER; KENNETH L. WILSON, et al.,	)	No. 92-36592
Plaintiffs-Appellees,	)	D.C. No. CV-91-243-FVS
v.	)	ORDER
KAISER ENGINEERS HANFORD CO.,	)	
Defendant-Appellant,	)	
and	)	
KAISER ENGINEERS HANFORD RETIREMENT PLAN; ADMINISTRATIVE COMMITTEE FOR THE KAISER ENGINEERS HANFORD RETIREMENT PLAN,	)	
Defendants.	)	

Before: WRIGHT, CANBY, and T.G. NELSON, Circuit Judges.

The panel has voted to deny Appellees' petition for rehearing and to reject the suggestion for rehearing en banc.

The petition for rehearing and suggestion for rehearing en banc were circulated to the full court and no timely request for en banc was made by any active judge.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX C
Filed: February 8, 1994
NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GLENN D. THESENVITZ; DONALD HEBERLEIN; JAMES E. BERWICK; DONALD E. PALMER; KENNETH L. WILSON, et al.,	)	No. 92-36592
Plaintiffs-Appellees,	)	D.C. No.CV-91-243-FVS
v.	)	MEMORANDUM*
KAISER ENGINEERS HANFORD CO.,	)	
Defendant-Appellant,	)	
and	)	
KAISER ENGINEERS HANFORD RETIREMENT PLAN; ADMINISTRATIVE COMMITTEE FOR THE KAISER ENGINEERS HANFORD RETIREMENT PLAN,	)	
Defendants.	)	

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Appeal from the United
States District Court
for the Eastern District of
Washington
Fred L. Van Sickle, District Judge,
Presiding

Argued and Submitted January 5, 1994**
Seattle, Washington

Before: WRIGHT, CANBY, and T.G. NELSON,
Circuit Judges.

**The panel unanimously finds this case suitable for decision without oral arguments. Fed. R. App. P. 34 (a) and Ninth Circuit Rule 34-4.

FACTS AND PROCEDURAL HISTORY

Plaintiff-Appellees are a group of former employees of Kaiser Engineers Hanford Company (KEH). KEH had contracted with the Department of Energy to perform certain tasks at the Hanford Nuclear Reservation in Washington, which had previously been performed by the Jones Construction Company (Jones).

KEH took over most of Jones' work force and also assumed liability for Jones' pension plan and profit sharing plan by amending its own pension plan. The amendment provided a formula for determining benefits upon early, voluntary retirement. The formula provided increased benefits for Jones' prior employees who retired prior to April 1, 1989. Employees who did not elect to retire risked involuntary layoffs. All the appellees are former KEH employees who have qualified for and

elected early retirement, except Norma Stark, who sues as the personal representative of the estate of her husband, Larry Stark, who was such a former KEH employee prior to his death.

KEH provided the eligible employees with information about the amount of pension benefits they would receive if they elected early retirement. Despite repeated requests, KEH refused to release documents or other information that would have allowed the appellees to check the calculations themselves. Unfortunately, the estimates were in error as a result of misuse of certain data relating to the Jones plan. The mistake resulted in promised benefits in most cases of at least double, and in one case, triple, the amount calculated to be correct. There is no question about the fact that appellees relied on the overstated benefits in making their decisions to

accept early retirement. They relinquished jobs that they could have retained with full compensation for additional years, and made substantial changes in their life-styles. Since May, 1990, the appellees have all been receiving reduced benefits based on correct calculations.

Appellees sued KEH, the KEH Retirement Plan and the Administrative Committee for the Plan under ERISA, seeking the higher benefits, both past and future. The district court dismissed the Plan and its Administrative Committee, holding the appellees were currently receiving all the benefits to which they were entitled under the Plan. Appellees did not appeal this ruling.

The district Court entered judgment against KEH on a theory of equitable estoppel, ordering KEH to pay the difference between the erroneously

calculated amount and the amount of benefits to which each of the appellees was actually entitled under the plan. KEH appeals the judgment for the district court. We reverse and remand.

DISCUSSION

The appellees did not identify any specific provision of ERISA under which they brought their suit, nor did the district court identify the specific ERISA provision pursuant to which it ruled for appellees. On appeal, appellees have identified 29 U.S.C. § 1132(a)(1)(b) and 29 U.S.C. § 1132(a)(3)(B)(i) and (ii).

The parties agree that this case is controlled by the recent case of Watkins v. Westinghouse Hanford Co., Nos. 91-36195 and 91-36233 (9th Cir. Dec. 29, 1993). In that case, this court held that neither of those ERISA sections will support an award of compensatory damages

on a theory of equitable estoppel. See slip op. at 14594, 14609-14612.

Accordingly, the judgment of the district court is REVERSED and the case is REMANDED to the district court with instructions to enter judgment for defendants. No costs or attorneys fees allowed.

APPENDIX D
Filed: July 9, 1992
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

GLENN D. THESENVITZ; et al.,	)	
Plaintiffs-	)	AMENDED JUDGMENT IN A CIVIL CASE
vs.	)	CS-91-243-FVS
KAISER ENGINEERS, et al.,	)	
Defendants.	)	

This action came to trial before the Court. The issues have been tried and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the plaintiffs Glenn D. Thesenvitz, Kenneth L. Wilson, Donald J. Heberlein, James E. Berwick, Ferrin K. Walker, Donald E. Palmer and Norma Stark as outlined in the Memorandum Opinion [Ct. Rec. 29], will continue to receive the 1990 corrected monthly pension benefits from the Kaiser Engineers Hanford Retirement Plan.

In addition, the plaintiffs are entitled to monthly payments from the Plan Administrator, Kaiser Engineers Hanford Company, for the differential between the monthly pension benefits that were promised by KEH administrators prior to Plaintiffs' retirement and initially paid by the Plan and the corrected monthly benefits paid by the Plan.

Plaintiffs are awarded the amount of $22,613.00 for attorneys' fees and costs. Kaiser Engineers Hanford Company, as the Plan Administrator, will pay the Plaintiffs' attorney fees and costs.

The claims against the Kaiser Engineers Hanford Retirement Plan and Administrative Committee for the Kaiser Engineers Hanford Retirement Plan are DISMISSED.

Dated: July 9, 1992 JAMES R. LARSEN,
Clerk

By: /s/
Lee Ann Mauk

APPENDIX E(a)
Filed: May 26, 1992
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

GLENN D. THESENVITZ; et al.,	)	NO. CS-91-243-FVS
Plaintiffs-	)	MEMORANDUM OPINION
vs.	)	
KAISER ENGINEERS, et al.,	)	
Defendants.	)	

Plaintiffs in this case are Glenn D. Thesenvitz, Kenneth L. Wilson, Donald J. Heberlein, James E. Berwick, Ferrin K. Walker, Donald E. Palmer and Norma Stark as the personal representative for the estate of Lawrence R. Stark. The decedent, Lawrence R. Stark, and all of the other Plaintiffs are retired employees of Kaiser Engineers

Hanford Company.[1] The Plaintiffs are bringing this action pursuant to 29 U.S.C. § 1001 **et. seq.**, the Employee Retirement Income Security Act (ERISA), and a theory of equitable estoppel, to reinstate the monthly pension benefits that were represented to them prior to retirement.

The Defendants are the Kaiser Engineers Hanford Company ("KEH"), the Kaiser Engineers Hanford Retirement Plan ("Plan"), and the Administrative Committee for the Kaiser Engineers Hanford Retirement Plan ("Committee"). The Defendant Plan counterclaims against Plaintiffs seeking repayment for alleged overpayments from the Plan because of a

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[1] Since Lawrence Stark was similarly situated to the other Plaintiffs, and the claims pursued by Norma Stark as personal representative of his estate are substantially similar to the other Plaintiffs' claims, the Court will include Norma Stark when it refers to "Plaintiffs."

mistake in computation.

This Court has jurisdiction over the parties and the subject matter of this lawsuit pursuant to 28 U.S.C. § 1331. Venue properly lies in the Eastern District of Washington.

The Court concludes that the Plaintiffs are entitled to reinstatement of the retirement pension benefits at the level represented to them in 1988 and the level they began receiving benefits when they retired in 1988 or 1989.

The Plaintiffs are entitled to recover the differential between the 1990 corrected benefits and the 1988 promised benefits, under a theory of equitable estoppel from the Kaiser Engineers Hanford Company alone, as the Plan Administrator. The Kaiser Engineers Hanford Retirement Plan is responsible only for continued payment of the corrected pension benefits as calculated

in May, 1990. No recovery is granted from the Administrative Committee or the individual members of the Committee.

All of the Plaintiffs are former employees of both the Kaiser Engineers Hanford Company and the J.A. Jones Construction Services Company ("Jones"). They became employees of KEH in 1987 when KEH assumed the former contractual responsibilities of Jones at the Hanford Nuclear Reservation. At the time of the change-over to KEH, there were no material changes in the Plaintiffs' job duties or salaries. During their employment with Jones, Plaintiffs participated in pension and profit-sharing plans. In 1988, KEH made available to the Plaintiffs an early retirement program that included incentives to retire before reaching age 65.

KEH was the Kaiser Engineers Hanford

Retirement Plan Administrator. KEH personnel officers were agents of the Administrative Committee of the Plan.[2] Representations made by KEH personnel officers served as representations by the Plan Administrator.

Prior to the time of their retirement, the Plaintiffs were informed by KEH administrators that they could choose from several options the method in which they would receive their pension benefits. Plaintiffs were told they could receive their pension benefits in the form of either monthly payments, or one lump sum payment in an actuarial

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[2] Jon Bailey was Principal Systems Coordinator and Benefits Accountant for KEH. (See Ex. 7 Mr. Bailey's direct supervisor was Clara Berger, Manager of Compensation and Benefits and KEH Retirement Plan Administrator. (See Ex. 19, 21.) Ms. Berger's supervisor was John Carter, Manager of Personnel and Labor Relations and Chairman of KEH Retirement Plan Committee. (See Ex. 6, 19).

equivalent.

KEH administrators provided employees with estimates of their retirement income to assist them in determining whether to elect early retirement, and if so, whether to take a monthly payment or the lump sum payment. Prior to their retirement, Plaintiffs were told that they could receive the following monthly payments as pension benefits:

J. Berwick	$ 762.11
D. Heberlein	$1,572.51
D. Palmer	$ 418.79
L. Stark	$ 847.16
G. Thesenvitz	$1,159.16
F. Walker	$ 543.55
K. Wilson	$ 837.94

The benefits represented as accurate were based on "Amendment #3" to the Plan, which was in effect before the Plaintiffs' retirement.

The projections of early retirement benefits were calculated from a formula based on Amendment #3 and developed by Judith Andersen, a KEH administrator, in coordination with a member of KEH's actuarial firm and Penny Carter, a KEH benefits manager from KEH central headquarters in Oakland, California.

The formula factored together the benefits from the Jones pension plans and the KEH pension plans to arrive at pension amounts for KEH employees who were formerly Jones employees. A worksheet based on this formula was provided to each of the Plaintiffs with the projected benefits noted. Before the Plaintiffs actually retired, another computation of projected benefits was made, which in each case was very similar to the first worksheet.

The early retirement worksheets developed by KEH contained a basic error.

The error involved using an annual gross benefit figure and subtracting monthly deductions to arrive at the monthly early retirement benefit. The result was an erroneous monthly benefit calculation for each of the Plaintiffs.

The erroneous calculations were presented to the Plaintiffs prior to their retirement as accurate and reliable. While administrators did not deliberately mislead the plaintiffs as to the amount of monthly retirement benefits, these representations were false.

All of the Plaintiffs retired from their employment with KEH in 1988 and 1989 under the early retirement plan. Each of the Plaintiffs chose to take his KEH pension benefits in the form of a monthly payment rather than an actuarial equivalent lump sum. At least one of the plaintiffs requested a copy of the Plan

including Amendment #3 prior to electing to take early retirement. Even when requested to do so, KEH administrators knowingly failed to provide the Plaintiffs with a copy of the Plan and Amendment #3 before their retirement.

Upon retirement, and until May of 1990, KEH paid each of the Plaintiffs the pension benefits that had been represented. The erroneous formula was not discovered until the Spring of 1990 when a new formula and worksheet was being developed.

In January of 1990, the Plaintiffs received a letter from KEH indicating that the pension benefits would be even higher than projected because of additional earnings for the three months of work performed in 1989 before retirement and not computed in the original benefits. Plaintiffs had no reason to suspect the accuracy of the

misrepresentations until receiving a May, 1990 letter from KEH, over a year after retirement.

In May of 1990, KEH sent a letter to each of the Plaintiffs stating that a mistake had been made in the way his pension benefits had been calculated. The amount of monthly overpayments varied from $200 to over $1,000 per month. The May, 1990 letter set forth the corrected pension benefits indicated below:

J. Berwick	$351.15
D. Heberlein	$522.07
D. Palmer	$216.56
L. Stark	$569.42
G. Thesenvitz	$552.30
F. Walker	$271.66
K. Wilson	$324.52

After sending the May, 1990 letter to the Plaintiffs, KEH paid only the corrected monthly pension benefits. When the overpayments were discontinued in

May, 1990, KEH offered Plaintiffs the opportunity of returning to work at the same or similar positions as they had previously held, with a salary comparable to their 1988 or 1989 salary. All of the Plaintiffs declined the re-employment offer. KEH did not offer to allow the Plaintiffs to change their benefit option to the lump sum package.

DISCUSSION

The plaintiffs contend that the Defendants made knowing or reckless misrepresentations, or a knowing concealment of material facts, to the Plaintiffs prior to retirement, upon which the Plaintiffs relied to their detriment.

Estoppel

ERISA provides causes of action to recover benefits due under pension plans and for breach of fiduciary duty by plan administrators. ERISA does not provide

the scope of contract law remedies available for recovery of pension benefits. See Scott v. Gulf Oil Corp. 754 F.2d 1499, 1501 (9th Cir. 1985).

As part of the federal common law the Ninth Circuit Court of Appeals has noted that "[e]ven though ERISA preempts common law theories of contract law the principles of equitable estoppel apply to pension plans." Dockray v. Phelps Dodge Corp., 801 F.2d 1149, 1155 (9th Cir. 1986) (cites omitted) (Citing Ellenburg v. Brockway, Inc., 763 F.2d 1091, 1096 (9th Cir. 1985)). The Dockray Court outlined the essential elements of estoppel as follows:

> In this circuit, estoppel is available against a nongovernmental party who has made a knowing false representation, or concealment of material facts, to a party ignorant of the true facts, with the intention that the other party should rely on the representation, and the other party actually and

detrimentally relies on it.

Id.

"Concealment of material facts" is included as a possible element of the estoppel theory. Dockray v. Phelps Dodge Corp., 801 F.2d 1149, 1155 (9th Cir. 1986). In Carver v. Westinghouse Hanford Company, et al., 951 F.2d 1083 (9th Cir. 1991), the distinction between concealment and misrepresentation was briefly considered, but not fully analyzed because it was raised for the first time on appeal. Carver v. Westinghouse Hanford Company, et al., 951 F.2d 1083, 1088 (9th Cir. 1991). The court noted that "such a distinction between concealment and a knowing false representation might make for an interesting discussion. We decline the temptation, however, because counsel has raised this issue for the first time on appeal." Carver v. Westinghouse Hanford

Company, 951 F.2d at 1088.

Concealment of material facts is an essential element in the Plaintiff's estoppel claim in this case.[3] In

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[3] In Watkins v. Westinghouse Hanford Company, et al., No. CS-90-135-JLQ, slip op. at 27 (E.D. Wash. July 26, 1991), the court dicta included as an element for equitable estoppel whether "the administrator (or someone with the authority to speak for and bind the administrator) makes a false representation or concealment of material fact, knowing it to be false, **or in reckless disregard of its truth or falsity** . . ." Watkins v. Westinghouse Hanford Co., et al., No. CS-90-135-JLQ, slip op. at 27 (E.D. Wash. July 26, 1991) (emphasis added).

In their trial brief, the Plaintiffs in this case argue that the misrepresentations concerning monthly pension benefits made to the Plaintiffs prior to retirement were made either knowingly or with "reckless disregard of their truth or falsity." Although the Watkins Court included the "reckless disregard" standard in dicta, the Court is not persuaded that this standard is an acceptable part of the estoppel doctrine for ERISA cases. Nor is the court persuaded that the Plaintiffs have proved their contention that the KEH administrators knowingly misrepresented the monthly amounts of pension benefits to the Plaintiffs prior to their retirement.

Dockray, the first element of an estoppel claim in this type of case is "knowing false representation, or concealment of material facts . . ." Dockray v. Phelps Dodge Corp., 801 F.2d at 1155. Although the Court rejects Plaintiffs' contention that the Defendants in this case made a knowing misrepresentation to the Plaintiffs, the Court does agree that a copy of the Plan with Amendment #3, which is the basis for the formula used to compute the projected monthly pension benefits, is "a material fact" in this case.

Some of the Plaintiffs asked KEH administrators to explain the formula and calculation of their monthly pension benefits to them before they made the commitment to take early retirement. However, the KEH administrators who were making the calculations had not participated in the creation of the

formula and did not fully understand its basis. One of the Plaintiffs, Glenn Thesenvitz, specifically requested a copy of the benefit Plan and Amendment #3, which was in effect at the time that the monthly pension benefits were calculated. The KEH administrator in charge of the benefits counselling program, Ms. Berger, was aware of Mr. Thesenvitz's request, which was repeated several times, had access to the Amended Plan and Amendment #3, but did not provide a copy of the Plan or Amendment #3 to Mr. Thesenvitz, or any of the other Plaintiffs. Ms. Berger testified she did not believe it was appropriate for the Plaintiffs to have a copy of the Plan and Amendment #3. Clearly, it was an intentional decision on her part to not provide Plaintiffs with the Plan and Amendment #3.

Part of the purpose of ERISA is to assure complete and accurate disclosure

of pension plan provisions to employees. See 29 U.S.C. §1001(a), §1001(b).

Without a copy of the Amended Plan and Amendment #3, Plaintiffs were left with no choice but to rely on KEH administrators' calculations of monthly pension benefits. Plaintiffs were not in a position to check the calculations themselves, because the only formula that they had access to was the worksheet which contained a faulty hybrid of annual and monthly factors.

The Plaintiffs could not take the Plan Administrators' projections to their accountants, lawyers, or financial advisors, because the lack of a copy of the Plan or Amendment #3 would make any party equally reliant on the faulty formula and worksheet. At most, using the faulty formula and worksheet would have revealed only mathematical computation errors. The representations

made to the Plaintiffs about their monthly pension benefits was the only information the Plaintiffs had in determining their benefits. Access to the Plan and Amendment #3 would have given the Plaintiffs a basis and opportunity to determine that there was a miscalculation of monthly pension benefits.

The Plan document and Amendment #3 were essential to enable Plaintiffs to accurately determine their monthly pension benefits. The failure of KEH administrators to provide a copy of those documents when requested was a knowing concealment of material facts. The Plaintiffs have satisfied the first element of their estoppel claim.

The second element is that the Plaintiffs were "ignorant of the true facts." Dockray v. Phelps Dodge Corp., 801 F.2d 1149, 1155 (9th Cir. 1986). As

was discussed above, the lack of access to the Plan and Amendment #3 necessarily made the Plaintiffs ignorant of the true facts regarding the application of the KEH formula to compute their correct monthly pension benefits. Even when some of the Plaintiffs questioned the KEH benefits counsellor about the seeming inconsistency between a relatively high monthly pension benefit and low actuarial lump sum, they were informed by the KEH administrators that the amounts were accurate. The Plaintiffs were ignorant of the true facts and incapable of rediscovering them because of lack of access to the material information contained in the Plan and Amendment #3.

Were representations made with the intention that the other party should rely on the representation? KEH initiated the chain of events that led to the Plaintiffs' retirement by creating

the early retirement package and sending an interoffice memorandum (Ex.18) to all potential participants, including the Plaintiffs. KEH invited the Plaintiffs to visit with Mr. Bailey, the KEH benefits administrator, in order to have him compute their projected pension benefits and option packages. The KEH administrators made the erroneous representations to the Plaintiffs as part of their employment duties and had the authority to make those representations. Clearly, the representations were made with the intention that the Plaintiffs rely on them as accurate.

In addition, the KEH letter (Ex. 18) specifically provides that special advantages would be given to those people who took advantage of the early retirement package. In light of KEH's initiation of the early retirement program and the advantages that they

offered to the Plaintiffs to entice participation, there is no doubt that KEH intended that Plaintiffs rely on the monthly pension benefits projections in making their decision to take early retirement. The third element of estoppel has been met.

The Plaintiffs "actually and detrimentally relied[d] on [the representation]." Dockray, 801 F.2d at 1155. All the Plaintiffs relied on the KEH representations of their monthly pension benefits in deciding to participate in the early retirement program. The Plaintiffs retired, relinquishing jobs that could have been pursued for full compensation for additional years, and made substantial changes in their lifestyles. Some of the changes include major expenditures on recreation vehicles, remodeling projects for their homes, and acceptance of

additional family responsibilities. Although KEH offered to re-employ the Plaintiffs after the errors were discovered, the offer was without substance. The proposed re-employment was at the Plaintiffs' previous wage levels of 1988 or 1989, without adjustment for any cost of living increases. The offer did not include any compensation to accommodate the Plaintiffs for the irrevocable decisions that had made at retirement regarding early withdrawal of Social Security and 401(k) fund benefits. In at least Mr. Thesenvitz's case, the KEH offer of re-employment did not include a comparable job to the one from which he retired.[4]

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[4] Mr. Thesenvitz accepted the early retirement offer at age 56 1/2 when he was an Area Construction Manager with an annual salary of $53,000. The KEH re-employment offer was for an Area Construction Superintendent position, not Area Construction Manager position, which

(continued...)

Nor did the offer for re-employment include compensation for lost opportunity to increase future retirement benefits.

Each of the Plaintiffs relied upon the representations that were made by KEH prior to retirement. The Plaintiffs retired before it was mandatory to do so because of the KEH representations concerning monthly pension benefits. Clearly, Plaintiffs relied on the representations made by the KEH administrators to their detriment.

From whom may the Plaintiffs recover? The law of the Ninth Circuit is "that an employee benefit fund may not be required by estoppel to make payments not authorized by a written plan." Hansen v. Western Greyhound Retirement Plan, 859 F.2d 779, 781 (9th Cir. 1988) citing

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[4](...continued)
Mr. Thesenvitz contends was a lower ranked job.

Davidian v. Southern California Meat Cutters Fund, 859 F.2d 134, 135 (9th Cir. 1988) (per curiam)). The Committee is responsible for discharging its duties "in accordance with the documents and instruments governing the plan . . ." 29 U.S.C. §1104(a)(1)(D).

Recovery on an estoppel theory against a pension plan would violate the rights of other beneficiaries in that plan and would conflict with the purposes of ERISA. Watkins v. Westinghouse Hanford Co., et al., No. CS-90-135-JLQ, slip op. at 32 (E.D. Wash. July 26, 1991). However, recovery against the administrator, as opposed to the plan, would not diminish the pension funds or disadvantage other beneficiaries. Id. at 32-33.

The recalculated pension benefits of Plaintiffs are in accord with the Plan and Amendment #3. The higher projected

monthly benefit rate would deplete the pension fund inappropriately and would be a violation of ERISA by requiring the Committee to pay pension fund amounts that exceed the Plaintiffs' rightful entitlement. The Plaintiffs have no basis for recovery from either the Plan or the Committee.

An ERISA plan participant may recover from an employer as administrator on a theory of equitable estoppel. See Carver v. Westinghouse Hanford Company, 951 F.2d at 1083, 1087-88 (9th Cir. 1991) (citing Dockray v. Phelps Dodge Corp., 801 F.2d 1149, 1155 (9th Cir. 1986)).

Plaintiffs are entitled to prevail on their estoppel claim against KEH as the Plan Administrator. As the Plan Administrator, KEH is liable to the Plaintiffs for the difference between the correct benefits and the amounts represented by KEH prior to retirement.

Having concluded that the Plaintiffs can recover under the estoppel theory, the Court does not further analyze Plaintiffs' additional claims.

c. Defendant Plan's Counterclaim

The Defendant Plan seeks reimbursement of the overpayment made to the Plaintiffs from the time of retirement until the monthly benefits were reduced to the correct amount in May, 1990.[5] An ERISA fund is entitled to an "equitable remedy to recover mistaken payments out of the corpus of the trust." Luby v. Teamsters Health, Welfare & Pension Trust Funds, 944 F.2d 1176, 1186

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[5] The Defendant Plan is seeking repayment of alleged overpayments resulting from the pension benefits miscalculation only from the seven named Plaintiffs in this case, although approximately thirty people were affected by the miscalculation. The Plan is not seeking repayment of alleged overpayments from any participant who chose the lump sum benefit package rather than the monthly pension benefit package.

(9th Cir. 1991). General principles of trust law apply to ERISA. Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 110 (1989). In general, a beneficiary is liable for overpayments from a trust "unless he has so changed his position that it is inequitable to compel him to make repayment." Restatement 2d of Trusts § 254 (1959).

As discussed above, the Plaintiffs made substantial changes in their lives as a result of the miscalculations of their retirement benefits. Requiring the Plaintiffs to repay benefits on which they relied to their detriment would be inequitable and unjust.

The Court denies the Plan's counterclaim for overpayment.

d. Attorney Fees

Plaintiffs have incurred attorney's fees and costs in order to pursue their rights under ERISA.

ERISA provides for an award of reasonable attorney fees and costs to either party for actions brought by plan participants, beneficiaries, or fiduciaries, to either enforce a pension plan, recover benefits, or to clarify rights under a plan. 29 U.S.C. §1132(g)(1).

The following factors are considered in determining whether to award attorney fees in ERISA cases:

> (1) the degree of the opposing parties' culpability or bad faith; (2) the ability of the opposing parties to satisfy an award of fees; (3) whether an award of fees against the opposing parties would deter others from acting in similar circumstances; (4) whether the parties requesting fees sought to benefit all participants and

beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA; and (5) the relative merits of the parties' positions.

Carpenters Southern Cal. Admin. Corp. v. Russell, 726 F.2d 1410, 1415 (9th Cir. 1984).

Because neither the Plan nor the Committee are liable in this case, the Court analyzes the factors in relation to KEH alone, as the Plan Administrator.

(1) Culpability or bad faith: Although KEH did not show bad faith in misrepresenting the benefits to the Plaintiffs, KEH knowingly withheld material facts.

(2) Ability to pay: Kaiser Engineers Hanford Company is in a better position to pay the attorney fees and costs of the Plaintiffs than the Plaintiffs.

(3) Deterrence: Award of fees in this case will undoubtedly deter KEH and other companies from acting in a similar manner in the future.

(4) Benefits of the suit: The Plaintiffs have pursued their claim to benefit a group of similarly situated plaintiffs. The use of "concealment of material facts" element to the estoppel theory applied in this case should be of assistance in the development of remedies under ERISA.

(5) Relative merits: As discussed above, the Plaintiffs' estoppel claim is valid and equitable.

An award of attorney's fees and costs in this matter is both appropriate and equitable. The Plaintiffs are awarded reasonable attorney's fees and costs to be paid by Defendant Kaiser Engineer Hanford Company, as the Plan Administrator.

The Plaintiffs will continue to receive the 1990 corrected monthly pension benefits from the Kaiser Engineers Hanford Retirement Plan. In addition, the Plaintiffs are entitled to monthly payments from the Plan Administrator, Kaiser Engineers Hanford Company, for the differential between the monthly pension benefits that were promised by KEH administrators prior to Plaintiffs' retirement and initially paid by the Plan and the corrected monthly pension benefits paid by the Plan.[6] (See Letters from J.A. Carter, KEH Administrator, to each Plaintiff (May 7, 1990), Pl.'s Ex. 6, and Appendix to this Order.) Kaiser Engineers Hanford Company, as the Plan Administrator, will

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[6] Mrs. Stark's recovery will be different from the recovery of the other Plaintiffs, because Mr. Stark apparently had elected to have a "life-Only" form of annuity. See Letter from Barbara Smetana to Norma Stark, Pl.'s Ex. #5.

pay the Plaintiffs' attorney fees and costs.

Plaintiffs' counsel is directed to submit a memorandum and affidavits within 15 days to respond to the Plaintiffs' requests. Any response to Defendant's memorandum and affidavits will be filed within 5 days by the Plaintiff. Unless requested, the issues concerning attorney's fees and costs will be determined without oral argument.

IT IS SO ORDERED. The Clerk is hereby directed to enter this Order and furnish copies to counsel and close the case.

DATED this 26th day of May, 1992.

/s/
FRED VAN SICKLE
United States District Judge

APPENDIX E(b)

Employee	KEH Proj. May 1990 & Amounts Initially Paid	Corrected Monthly Plan Amts	Difference
L.Stark	$ 847.16	$569.42	$ 277.74[7]
K.Wilson	$ 837.94	$324.52	$ 513.42
Thesenvitz	$1159.16	$552.30	$ 606.86
Heberlein	$1572.51	$522.07	$1050.44
J.Berwick	$ 762.11	$351.15	$ 410.96
F.Walker	$ 543.55	$271.66	$ 271.89
D.Palmer	$ 418.79	$216.56	$ 202.23

See Letters from J.A. Carter, KEH Administrator, to each Plaintiff (May 7, 1990) (Pl.'s Ex. 6).

[7] Mrs. Stark's recovery will be different from the recovery of the other Plaintiffs, because Mr. Stark apparently had elected to have a "Life-Only" form of annuity. See Letter from Barbara Smetana to Norma Stark, Pl.'s Ex. #5.

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APPENDIX F(a)
Filed: May 26, 1992
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

GLENN D. THESENVITZ; et al.,	)	
Plaintiffs-	)	JUDGMENT IN A CIVIL CASE
vs.	)	CS-91-243-FVS
KAISER ENGINEERS, et al.,	)	
Defendants.	)	

This action came to trial before the Court. The issues have been tried and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the plaintiffs Glenn D. Thesenvitz, Kenneth L. Wilson, Donald J. Heberlein, James E. Berwick, Ferrin K. Walker, Donald E. Palmer and Norma Stark as outlined in the Memorandum Opinion [Ct. Rec. 29], will continue to receive the 1990 corrected monthly pension benefits from the Kaiser Engineers Hanford Retirement Plan.

In addition, the plaintiffs are entitled to monthly payments from the Plan Administrator, Kaiser Engineers Hanford Company, for the differential between the monthly pension benefits that were promised by KEH administrators prior to Plaintiffs' retirement and initially paid by the Plan and the corrected monthly benefits paid by the Plan.

Kaiser Engineers Hanford Company, as the Plan Administrator, will pay the Plaintiff's attorney fees and costs.

Dated: May 26, 1992

JAMES R. LARSEN,
Clerk

By: /s/

Lee Ann Mauk, Deputy

APPENDIX F(b)

Employee	KEH Proj. May 1990 & Amounts Initially Paid	Corrected Monthly Plan Amts	Difference
L.Stark	$ 847.16	$569.42	$ 277.74[8]
K.Wilson	$ 837.94	$324.52	$ 513.42
Thesenvitz	$1159.16	$552.30	$ 606.86
Heberlein	$1572.51	$522.07	$1050.44
J.Berwick	$ 762.11	$351.15	$ 410.96
F.Walker	$ 543.55	$271.66	$ 271.89
D.Palmer	$ 418.79	$216.56	$ 202.23

See Letters from J.A. Carter, KEH Administrator, to each Plaintiff (May 7, 1990) (Pl.'s Ex. 6).

[8] Mrs. Stark's recovery will be different from the recovery of the other Plaintiffs, because Mr. Stark apparently had elected to have a "Life-Only" form of annuity. See Letter from Barbara Smetana to Norma Stark, Pl.'s Ex. #5.

(3)

APPENDIX - PART II

Supreme Court, U.S.
FILED

IN THE **94127** JUL 20 1994

SUPREME COURT OF THE UNITED STATES OFFICE OF THE CLERK

_____ Term, 1994

No. _____

GLENN D. THESENVITZ, et al,

Petitioners,

v.

KAISER ENGINEERS HANFORD COMPANY, et al,

Respondents.

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE
UNITED STATES

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90 pp

APPENDIX G
FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JIMMIE L. WATKINS, WANDA WATKINS, husband and wife, Plaintiffs-Appellees-Cross-Appellants, vs. WESTINGHOUSE HANFORD COMPANY, a Washington Corporation, et al., Defendants-Appellants-Cross-Appellees	)	Nos. 91-36195 91-36233 D.C. No. CV-90-0135-JLQ OPINION

Appeal from the United States District Court for the Eastern District of Washington
Justin L. Quackenbush, District Judge, Presiding

Argued and Submitted
November 1, 1993--Seattle, Washington

Filed December 29, 1993

Before: Thomas Tang, Jerome Farris, and Pamela Ann Rymer, Circuit Judges

Opinion by Judge Rymer

SUMMARY

Labor and Employment/Pensions/ERISA

The court of appeals affirmed in part and reversed in part a district court judgment. The court held that the Employee Retirement Income Security Act (ERISA) does not sanction a pension plan participant's recovery of benefits-related damages on an equitable estoppel theory.

From July 1, 1974 until July 14, 1981, appellee Jimmie Watkins worked for appellant Westinghouse Hanford Co. (WHC), a private contractor working at the Hanford Nuclear Reservation (HNR). He obtained vested rights to accrued pension benefits under WHC's pension plan (the Westinghouse Plan). From August 1, 1981 until June 28, 1987, Watkins worked for appellant Rockwell Hanford Operations, another private contractor working at

HNR. He participated in Rockwell's plan, which gave him no credit for his time with WHC. Watkins had no vested rights in accrued pension benefits under the Rockwell Plan.

The Department of Energy consolidated the primary responsibility for HNR's daily operations with WHC, effective June 29, 1987. On June 29, 1987, Watkins again became a WHC employee. WHC determined that the assets of the private contractors' pension plans should be merged into a single, site-wide pension plan, the WHC's Operating and Engineering Pension Plan (HOEP Plan), under which the benefits paid out would depend upon the employee's number of years of "credited service."

WHC announced a Voluntary Reduction in Force Program (VRF Program), under which employees who retired early would be entitled to receive pension benefits

prior to the usual retirement age. By letter dated November 12, 1987, WHC informed Watkins that if he chose early retirement, all of his prior service at HNR would be combined, both for vesting and benefit-computation purposes. Watkins decided to retire early and participate in the VRF Program effective January 1, 1988. He began receiving HOEP Plan monthly pension benefits calculated using all of his preconsolidation service at HNR.

As of August 1, 1988, the HOEP Plan's Administrative Committee determined that the HOEP Plan's express provisions recognized prior service only to the extent that prior service was recognized under the pension plan of the employer for which the employee worked immediately prior to the consolidation.

Watkins elected to participate in a new Special Voluntary Retirement Program

(SVR Program), and began receiving enhanced monthly pension benefit payments.

A Committee member notified Watkins that his HOEP benefits had been calculated erroneously to include his preconsolidation years with WHC, and his monthly payments under the HOEP Plan would be reduced to reflect the fact that his initial WHC years did not count as "credited service." The Committee denied Watkins' appeal of the recalculation of his pension benefits.

Watkins and his wife sued WHC, alleging, among other things, that WHC was estopped to change his original benefits calculation, and failed to interpret the HOEP Plan in accordance with its express provisions. The district court ruled in the Watkinses' favor on the estoppel claim, but in WHC's favor on the remaining claims.

The Watkinses appealed, contending that WHC was obliged to restore and aggregate Watkins's prior service with WHC for purposes of calculating his HOEP Plan benefits. The Watkinses argued that 1) WHC's November 12, 1987 letter established an ERISA plan, 2) the Westinghouse Plan and the Rockwell Plan were merged into and continued as part of the HOEP Plan, and 3) the HOEP Plan itself required aggregation of all of his preconsolidation serve at HNR because Watkins had "credited service" under the HOEP Plan by reason of his prior WHC service. WHC appealed the judgment in favor of the Watkinses on the estoppel claim.

[1] The letters WHC wrote to Watkins contained none of the details about beneficiaries, source of financing, or procedures for paying and administering benefits that were

necessary to create an ERISA plan. Moreover, the letter was not the only writing that had anything to do with Watkins's retirement; there were summary booklets anticipating the HOEP Plan and a detailed, comprehensive written plan.

[2] The fact that the Westinghouse Plan was "merged into and maintained" as part of the HOEP Plan did not indicate that the terms of the predecessor plans were to be integrated into the HOEP Plan.

[3] Thus, the HOEP Plan became the some document to which reference should be made in determining postconsolidation pension benefits.

[4] Because the Rockwell Plan gave no credit for WHC service, Watkins's prior WHC service could not be included in "credited service" for purposes of applying the HOEP Plan's benefits formula.

[5] The HOEP Plan was reasonably

construed to mean that Watkins had accrued benefits under the Westinghouse Plan, and that Watkins's prior service would be credited for purposes of vesting but not for purposes of the formula to be applied.

[6] The Watkinses' equitable estoppel claim had no merit in light of the Supreme Court's recent decision in Mertens v. Hewitt Associates.

[7] The Court held that the term "other appropriate equitable relief" in a statute authorizing civil actions by plan participants encompassed only an injunction, mandamus, or restitution. A reading of the statute to provide authority for the Watkinses' equitable estoppel claim was untenable.

[8] ERISA did not sanction the recovery of damages the district court held, and therefore, the judgment in the Watkinses' favor must be reversed.

COUNSEL

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Marvin L. Gray, Jr., Davis Wright Tremaine, Seattle, Washington, for the defendants-appellants-cross-appellees.

OPINION

RYMER, Circuit Judge:

This is our second trip through the thicket of pension plans at the Hanford Nuclear Reservation (HNR). In Carver v. Westinghouse Hanford Co., 951 F.2d 1083, (9th Cir. 1991), cert. denied 112 S.Ct. 3036 (1992), we considered whether Westinghouse Hanford Company (WHC)'s Operating and Engineering Pension Plan (HOEP Plan), adopted after the consolidation of HNR's operations, improperly failed to recognize prior service for other contractors at HNC. We

held that the operative plan was the formal plan adopted in December 1987, and that ERISA does not require WHC to take the years of service accrued for predecessor employers onto its pension plan for purposes of calculating benefits. We also suggested that if 'WHC had made knowing false representations or concealments of material facts, it might be equitably estopped from interpreting the plan in a manner which does not give HNR employees credit for the time they believe they deserve. Id. at 1087-88. It is principally this issue -- whether WHC can be equitably estopped on account of misrepresentations it made to plaintiff Jimmie Watkins about aggregating prior service and thereby be required to pay benefits promised but not paid -- that we must resolve in this appeal.

Following a stipulated facts trial,

the district court dismissed the Watkinses' claims under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001-1461, but found that WHC had knowingly misrepresented that all of the Watkins's HNR service would be included in the calculation of his benefits. It found that all other elements of estoppel had been established and that the Watkinses were entitled to recover from WHC a lump sum reflecting past benefits promises but not received, as well as the present value of unpaid future benefits promised by WHC but not being paid under the HOEP Plan.

Both parties appeal. As the Supreme Court has recently held, equitable relief in the form of the recovery of compensatory damages is not an available remedy under 29 U.S.C. § 1132(a)(3), which the district court cited as

statutory authority for the Watkinses' equitable estoppel claim. Mertens v. Hewitt Assocs., 113 S.Ct. 2063 (1993). We have also recently held that an estoppel claim cannot result in an payment of benefits that would be inconsistent with the written plan. Greany v. Western Farm Bureau Life Ins. Co., 973 F.2d 812, 822 (9th Cir. 1992). As this is the effect of the relief in this case, that part of the district court's judgment cannot stand. We have jurisdiction, 28 U.S.C. § 1291, and we accordingly reverse that part of the judgment which awards damages on the Watkinses' claim for equitable estoppel. We affirm the district court's judgment on the Watkinses' ERISA claims and deny their request for attorney's fees on appeal.

I.

Since the end of World War II, the

United States Department of Energy (DOE) and its predecessors have operated the Hanford Nuclear Reservation in Benton County, Washington. A series of private contractors have performed work on HNR. Because changes in job functions did not always coincide with changes in private contracts, the common practice at HNR was for successor contractors to employ individuals who had worked to a predecessor contractor. The employees would perform essentially the same work at HNR; they would, however, work for a different employer.

Almost all of the private contractors had their own pension plans. This was true of the two contractors that employed Jimmie Watkins during his time at HNR: WHC and Rockwell Hanford Operations (Rockwell). Watkins worked for WHC from July 1, 1974 until July 14, 1981; during that time, Watkins obtained

vested rights to accrued pension benefits under the Westinghouse Hanford Company Pension Plan (Westinghouse Plan). From August 1, 1981 until June 28, 1987, Watkins was a Rockwell employee and a participant in the Rockwell Hanford Operations Plan (Rockwell Plan). The Rockwell Plan gave Watkins no credit for his time with WHC; consequently, Watkins obtained no vested rights in accrued pension benefits under the Rockwell Plan.

In 1986, DOE decided to consolidate the primary responsibility for HNR's daily operations with one private contractor, WHC, effective June 29, 1987. On that date, Watkins was "terminated by transfer" from Rockwell to WHC, and he again became a WHC employee.

Prior to the consolidation, WHC determined that the assets of the private contractors' pension plans should be merged into a single, site-wide pension

plan, the HOEP Plan. The HOEP Plan was a "High Five" Plan -- one in which the benefits paid out would equal a percentage of the employee's compensation over her or his highest five compensation years times the number of years of "credited service". A major issue during the reorganization was whether an employee would receive recognition under the HOEP Plan for all of his or her years of service at HNR under all the various contractors. Because it took time to negotiate, the final HOEP Plan wasn't adopted until December 30, 1987. It was made retroactive to the June 29, 1987 consolidation date.

Soon after the consolidation, WHC announced a Voluntary Reduction in Force Program (VRF Program) for all eligible employees, including Watkins. Under the VRF Program, an employee who retired early would be entitled to receive

pension benefits prior to the usual retirement age.

On October 28, 1987, Watkins wrote to WHC, requesting a calculation of his pension benefits in the event he chose to participate in the VRF Program. In particular, Watkins wanted to know whether his initial time with WHC and his time with Rockwell would be combined for purposes of computing his benefits.

By letter dated November 12, 1987, WHC informed Watkins that if he chose early retirement, all of his prior service at HNR would be combined, both for vesting and benefits-computation purposes. At the time, however, no one at WHC and no one on the Plan's Administrative Committee (Committee), the Plan's administrator, knew whether the HOEP Plan would provide for the computation of benefits based on the aggregation of all preconsolidation and

postconsolidation service at HNR. WHC did not inform Watkins of this uncertainty. The district could find that neither WHC nor any of its employees "in bad faith, deliberately tried to mislead" Watkins in connection with this letter. Rather, the district court found "that the misrepresentations were due to some type of misunderstanding, miscommunication, or misinterpretation of the pending" HOEP Plan's provisions.

After he received this letter, Watkins decided to retire early from his $52,000-per-year job and participate in the VRF Program effective January 1, 1988. On that date, Watkins received $8,030.80 in separation pay and began to receive HOEP Plan monthly pension benefits of $657.14; the calculation of Watkins's monthly benefits included all of his preconsolidation service at HNR.

On May 10, 1988, WHC announced

another round of workforce reduction programs, including the Special Voluntary Retirement Program (SVR Program). The SVR Program offered eligible employees an additional three years of age and three years of service for purposes of computing pension benefits, as well as an additional $250 monthly "bridge" payment until the age of Social Security eligibility. WHC made the SVR Program available to former employees, including Watkins, who participated in the VRF Program, provided those employees would refund to WHC the amount they received in separation pay.

On August 1, 1988, WHC informed Watkins that if he were to participate in the SVR Program, his new monthly benefits would total $1,023.93, exclusive of the $250 "bridge" payment. WHC continued to include Watkins's preconsolidation service with WHC and Rockwell in its

calculation of monthly benefits. As of August 1, 1988, however, the Committee had determined that the HOEP Plan's express provisions recognized prior service only to the extent that prior service was recognized under the pension plan of the employer for which the employee worked immediately prior to the consolidation. As of the same date, at least one Committee member, Michael Byrd, WHC's Pensions & Savings Investments Manager, was aware that Watkins's monthly benefits were computed based on all of his preconsolidation HNR service, in contravention of the HOEP Plan. However, Byrd took no action at the time to correct the situation. The district court found this was a knowing misrepresentation.

On August 29, 1988, Watkins elected to participate in the SVR Program and refunded the $8,030.80 he had received in

separation pay. He then began receiving enhanced monthly pension benefit payments.

On May 17, 1989, Byrd notified Watkins that his HOEP benefits had been calculated erroneously to include his preconsolidation years with WHC (1974 through 1981). Byrd informed Watkins that, although his monthly payments would include $213.51 annuity payable under the Westinghouse Plan, Watkins's monthly payments under the HOEP Plan would be reduced to reflect the fact this his initial WHC years did not count as "credited service." Watkins never was asked to refund (and he never has refunded) any HOEP Plan benefits he received prior to May 17, 1989.

Watkins appealed the recalculation of his pension benefits to the Committee. On August 3, 1989, the Committee denied the appeal. Watkins then filed this

lawsuit, alleging WHC was estopped to change Watkins's original benefit calculation; WHC had failed to interpret the Plan in accordance with ERISA; and WHC had failed to interpret the plan in accordance with its express provisions.

The district court rule din the Watkinses' favor on the remaining claims for relief. It held that the HOEP Plan, as it was finally adopted and amended, was the "sole document to be interpreted." Applying a heightened standard of review, the court concluded the Watkinses had failed to establish that WHC incorrectly denied paying Watkins's claim for benefits.

II

On their appeal, the Watkinses argue that WHC and the district court erred because WHC's November 12, 1987 letter established an ERISA plan. They also argue that the Westinghouse Plan and the

Rockwell Plan were merged into and continued as part of the HOEP Plan. As a result, they contend, WHC was obliged either as successor employer to Rockwell under the old Westinghouse Plan to restore and aggregate Watkins's prior service with WHC for purposes of calculating HOEP Plan benefits as well as for vesting, accrual, and other purposes. Further, assuming that the operative plan is comprises of the November 12, 1987 letter, the Westinghouse document, the Rockwell Plan document, and the HOEP document, the Watkinses contend that the Committee abused its discretion in two respects: first, by decreasing Watkins's pension in May, 1989 -- and retroactively ending accrual of benefits under the Westinghouse and Rockwell Plans as of the date of consolidation -- without the formal action which is required for plan amendments; and second, by changing its

interpretation of the plan so as to disregard non-contiguous credited service prior to consolidation in the calculation of pension benefits. Alternatively, the Watkinses argue that the HOEP Plan itself requires calculation of early retirement allowances on the basis of "credited service", which in their view includes prior service for Westinghouse. Finally, they argue that to deny pre-break benefits as the Committee did contravenes ERISA because 29 U.S.C. § 1060 requires aggregation of pre-break and post-break service.

WHC responds that the district court correctly found that the HOEP Plan document is the only applicable plan. Under the HOEP Plan, benefits depend on the years of credited service determined in accordance with the plan of the employer for which the participant last worked -- Rockwell, in Watkins's case.

Because the Rockwell Plan gives no credit for Westinghouse service, Watkins's 1974-1981 Westinghouse service may not be included for purposes of applying the HOEP final pay formula. However, WHC notes, the old Westinghouse and Rockwell Plans remain in effect for purposes of paying benefits accrued under them. Thus, Watkins continues to receive vested benefits under the old Westinghouse Plan based on its "career average" formula; and he continues to receive benefits for his Rockwell and postconsolidation service under the HOEP Plan formula. For this reason, WHC contends, there was no "decrease" in benefits and the damages awarded amount to a windfall to Watkins.

A

Much of the Watkinses' appeal on their ERISA claims follows from Carver, which involved a group of employees who, like Watkins, thought the HOEP Plan

improperly failed to credit all of their preconsolidation service at HNR. Carver held that the interim plan descriptions did not establish a plan and that there was no HOEP Plan until December, 1987 when it was formally adopted. We also read the preliminary summary booklets as being consistent with the HOEP Plan itself, providing that no credit for benefit purposes would be given for prior years of HNR service unless such service would have been recognized by the plan in which the employee participated immediately before consolidation.

[1] The Watkinses try to distinguish their case from Carver because of their personal exchange of correspondence with WHC, and urge us to follow the Eleventh Circuit's decision in Williams v. Wright, 927 F.2d 1540 (11th Cir. 1991), which held that a letter to the company's longtime general manager

outlining the benefits and procedures to be followed in connection with his requirement created an ERISA plan. Id. at 1544-45. We need not decide whether to embrace Williams, however, because the letters WHC wrote Watkins contain none of the details about beneficiaries, source of financing, or procedures for paying and administering benefits that are necessary to create an ERISA plan.[1] See Carver, 951 F.2d at 1086. The November 12, 1987 letter simply informed Watkins, incorrectly, that if he chose early retirement under the VRF Program all his prior service at HNR would be combined

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[1]ERISA requires that "[e]very employee benefit plan . . . be established and maintained pursuant to a written instrument." 29 U.S.C. § 1102(a)(1). Each such plan must (1) provide a policy and a method for funding the plan, (2) describe a procedure for plan operation and administration, (3) provide a procedure for amending the plan, and (4) specify a basis for payments to and from the plan. Id. § 1102(b).

for vesting and benefits-calculation purposes. Nor was that letter the only writing that had anything to do with Watkins's retirement, as was the case with the employee in Williams; there were summary booklets anticipating the HOEP Plan and eventually, a detailed, comprehensive written plan. Even though the correspondence turned out to be inconsistent with the Plan ultimately adopted (unlike the summary booklets in Carver which were consistent with the HOEP Plan), the fact that the letters were mistaken cannot on that account alone create an ERISA plan. Otherwise, every communication about prospective benefits could create a unique plan for a single participant who is not differently situated from fellow employees for whom the plan is established. Such a result would run counter to ERISA's overriding interest in avoiding side agreements that

deviate from a plan applicable to all employees. See, e.g., Rodrigue v. Western & S. Life Ins. Co., 948 F.2d 969, 971 (5th Cir. 1991) (ERISA's writing, requirement protects the plan's actuarial soundness by preventing plan administrators from contracting to pay benefits to persons not entitled to them under the express terms of the plan."). Finally, as we said in Carver, "'it is the reality of a plan, fund or program and not the decision to extend certain benefits that is determinative.'" 951 F.2d at 1087 (quoting Donovan v. Dillingham, 688 F.2d 1367, 1373 (11th Cir. 1982) (en banc)). In Watkins's case as in the case of the HNR employees in Carver, "[t]he plan simply was not a reality until that December [1987] when it was formally adopted." Id.

The Watkinses argue another point not specifically addressed in Carver,

that the HOEP Plan, by its express terms, adopts and incorporates both the Westinghouse Plan and the Rockwell Plan which together require that Watkins's HOEP benefits be based on all his previous periods of service. Their first argument, that the Rockwell Plan requires aggregation of service because Watkins was "terminated for transfer" fails because Watkins did not "transfer" to Rockwell from Westinghouse; his employment at Westinghouse was terminated. The Watkinses' more compelling argument is that the Westinghouse Plan was merged into and maintained as part of this, or about the fact that the HOEP Plan Preamble provides that, as of the effective date, June 29, 1987, "each Predecessor Employer [Rockwell, in Watkins's case] ceased its employment of the Eligible Employees and they became employed by [WHC].

Westinghouse Hanford Company became successor employer under the Predecessor Plans of the Predecessor Employers and the assets of the Predecessor Plans were merged into the Plan." The parties disagree, however, about what these facts signify.

[2] The Watkinses argue that because the Westinghouse Plan was maintained as part of the HOEP Plan, it stayed alive in all respects including its provision that for vested employees, service prior to a break in service is restored upon the date of reemployment with WHC for purposes of vesting, benefit accrual, and calculating and paying benefits. Neither the fact that the Westinghouse Plan was "merged into and maintained" as part of the HOEP Plan nor the language relied upon in the Preamble, however, indicates that the terms of the Predecessor Plans were to be integrated

into the HOEP Plan; rather, WHC was to succeed to the status of employer under those plans so that it could assume responsibility for administering the existing pension funds and see to it that vested benefits under previous plans continue to be paid. To that end, the assets of Predecessor Plans -- money held in trust to pay accrued benefits -- were merged into the HOEP Plan.

[3] Accordingly, we see no reason to depart from Carver's conclusion or to disagree with the district court that there was no "interim plan" and that the only applicable plan is the HOEP Plan adopted in December, 1987. The district court correctly held that the HOEP Plan became the sole document to which reference should be made in determining postconsolidation pension benefits.

B

The Watkinses next argue that the

HOEP Plan itself requires aggregation of all of Watkins's preconsolidation service at HNR. they start from the premise that Watkins had "credited service" under the HOEP Plan by reason of his prior WHC service. Since Watkins had a nonforfeitable right to an accrued benefit as of consolidation and as of the date of his retirement, they contend that Article 4.2 of the HOEP Plan requires payment of an early retirement allowance based on that "credited service."[2] In

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[2] Article 4.2, entitled "Early Retirement Allowance," provides as follows:

> A participant who has attained age 55 and received credit for 10 years of Service under Article 6 shall be entitled to retire upon any first day of the month following his 55th birthday, which day shall be his Early Retirement Allowance. A Participant's Early Retirement Allowance shall be equal to his Accrued Benefit reduced one-half of one percent (1/2%) per month for each month

(continued...)

their view, crediting of prior service with Westinghouse and Rockwell for benefit calculation purposes is required, as the HOEP Plan "High Five" determination makes no distinction between compensation received before and after consolidation.

[4] WHC counters that the benefit formula in Article 4.1 of the HOEP Plan is based on "years of credited service," which Article 3.2(a) requires be determined in accordance with the plan of

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[2](...continued)
his Early Retirement Date is earlier than age 62. Effective January 1, 1988, the reference in the foregoing sentence to age 62 shall be changed to age 60. If a Participant elects to leave the employ of an Employer after attaining age 62 with not less than 10 Years of Service, credited under Article 6 he may elect early retirement and his Early Retirement Allowance shall be equal to his Accrued Benefit. Effective January 1, 1988, the reference in the foregoing sentence to age 62 shall be changed to age 60.

the employer for which the participant last worked -- i.e., Rockwell. Because the Rockwell Plan gave no credit for Westinghouse service, WHC contends that Watkins's prior Westinghouse service may not be included in "credited service" for purposes of applying the HOEP "High Five" formula. We agree.

1

When reviewing an administrator's interpretation of an ERISA plan, we apply de novo review "unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115 (1989); Dytrt v. Mountain State Tel. & Tel. Co., 921 F.2d 889, 894 (9th Cir. 1990). When such discretion exists, the arbitrary and capricious standard applies. Dytrt, 921 F.2d at 894. "[I]f

a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed as a factor in determining whether there is an abuse of discretion." Firestone, 489 U.S. at 115 (internal quotation marks and alteration omitted); see also Bogue v. Ampex Corp., 976 F.2d 1319, 1325 N.29 (9th Cir. 1992) ("Because the great deference accorded a plan administrator arises in part from the assumption of trust law that the trustee has no pecuniary interest in his decisions, proof that the trustee does have such interest correspondingly strengthens the court's level of review."), cert. denied, 113 S.Ct. 1847 (1993).

The HOEP Plan delegates to the Committee the discretionary authority to interpret the Plan's provisions. However, the district court properly

reviewed the Committee's interpretation under heightened scrutiny, since almost all the Committee members are WHC management employees. Firestone, 489 U.S. at 115.

In addition, the Watkinses submit that no deference is due to the Committee's decision because that decision was mandated by DOE. We do not need to resolve this issue, however, because the record does not support the Watkinses' argument. Although it is undisputed that WHC disagreed with DOE during the consolidation negotiations in 1987 about how the post-consolidation plan should calculate "credited service", once the HOEP Plan was adopted, there is no evidence that DOE influenced the Committee's interpretation of the plan when it determined Watkins's benefits in 1989. In any event, no matter whether the Committee's determination is reviewed

de novo or with some deference (factoring in the conflict of interest under which it was operating), we agree with its interpretation.

2

The Watkinses' position turns on the HOEP Plan provisions that define "credited service." Article 1.6 defines "credited service" as "service credited pursuant to Article 3." Article 3.2, in turn, provides in pertinent part:

> Credited Service prior to the Effective Date will be given in accordance with the following rules:
>
> (a) A Participant in the employ of an Employer on the Effective Date will receive credit hereunder for service prior to the Effective Date pursuant to the rules of the Predecessor Plan of the employer for which he last worked. . .

(Emphasis added.) We agree with the district court that the phrase "employer for which he last worked" is properly

interpreted in Watkins's case to be Rockwell. It is undisputed that the Rockwell Plan gave Watkins no credit, either for benefits-calculation or vesting purposes, for his prior service at Westinghouse. The parties also agree that Watkins had a nonforfeitable accrued benefit on June 29, 1987, by reason of his prior period of service with WHC.

[5] Based on these facts, the Watkinses suggest a number of different reasons why the Committee's interpretation conflicts with the HOEP Plan, but all of these reasons boil down to the point that the "credited service" and "accrued benefit" provisions pick up prior service for purposes of calculating benefits. The Watkinses' bottom line is that pre-break-in-service work for Westinghouse must be put together with postconsolidation service such that all benefits are "accrued" under the HOEP

Plan formula instead of partly under the old Westinghouse Plan "career average" formula (for Watkins's 1974-1981 Westinghouse service) and partly under the new HOEP "High Five" formula (for postconsolidation WHC service). We agree with the district court that the HOEP Plan was not misinterpreted by the Committee. The HOEP plan is reasonably construed to mean that Watkins had accrued benefits under the Westinghouse Plan (a fact WHC never has contested), and that Watkins's prior service would be credited for purposes of vesting but not for purposes of the formula to be applied.

Finally the Watkinses submit that the Committee erred by choosing an interpretation that favors the Plan, instead of the one urged by Watkins that was favorable to him, because a plan administrator is required to act in the

best interest of participants.. This argument is unavailing as the Watkinses' interpretation depends on the existence of an "interim plan" or a plan which consists of the November 12, 1987 letter, the Westinghouse Plan, the Rockwell Plan, and the HOEP Plan, which we have already held is not the case.

C

The Watkinses finally contend that the Committee's interpretation of the HOEP Plan as now allowing aggregation of Watkinses's preconsolidation service violates a number of ERISA provisions, particularly its notice and break-in-service rules. They complain that the HOEP Plan reduced accrued benefits under the Westinghouse and Rockwell Plans because it retroactively ended accrual of benefits under those plan as of June 28, 1987, without complying with ERISA's amendment procedures. The Watkinses also

argue that under ERISA, once an employee has achieved any percentage of vesting, all of his pre-break and post-break service must be aggregated for all purposes. This latter argument is foreclosed by Carver, where we held that there is nothing in ERISA relating to the amount of benefits to be calculated into a plan formula. 951 F.2d at 1088. The Watkinses's other arguments are also unavailing, given our conclusion that there was no "interim plan" and that the Westinghouse and rockwell plans were not part of the HOEP Plan for any purpose other than administering previously accrued and vested benefits. There was, accordingly, no amendment.

Section 1054(g)(1) provides that "[t]he accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in section 1082(c)(8)

... of this title."[3] Section 1082(c)(8), in turn, requires that notice of the proposed amendment be given to the Secretary of Labor, and that the Secretary either approve or, within 90 days, fail to disapprove the amendment.

It is undisputed that notice of the Watkins benefit decision was not given to the Secretary of Labor. The Watkinses argue that the decision therefore violated ERISA, as it was an "amendment" that decreased Watkins's "accrued benefit." But an "accrued benefit could have been "decreased" only if the Westinghouse Plan (which aggregates all Westinghouse service) is the operative postconsolidation plan document and if the HOEP Plan's "High Five" formula springs backward to merge Watkins's 1974-

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[3] Section 1054(g)(1) also requires compliance with 29 U.S.C. § 1441. Section 1441 deals with terminated plans and does not apply in this case.

1981 Westinghouse service into his postconsolidation WHC service so as to make benefits for the entire period of Westinghouse service accrue at the HOEP Plan formula level. That simply isn't what happened.

Watkins's benefits under the Westinghouse Plan for his initial period of service have not been reduced. They were calculate under the "career average" formula of that Plan. Watkins's post-June 29, 1987 benefits were calculated under the HOEP Plan and its "High Five" formula. As we have held, the Westinghouse Plan did not merge into the HOEP Plan and require linkage of service at the higher HOEP rate.

The Watkinses also argue that the Committee violated 29 U.S.C. § 1054 by changing the interpretation of what qualified as "credited service" under the Plan. Again, this argument fails because

the Committee never reduced any of the benefits Watkins already had accrued. The changed interpretation did result in lower monthly benefit payments, but only for future payments. This does not run afoul of ERISA.

While ERISA sets forth strict guidelines on rights that may not be forfeited (i.e., vested rights) and benefits that may not be decreased (i.e., accrued benefits), "courts have uniformly relied on Alessi [v. Raybestos-Manhattan, Inc., 451 U.S. 504, 511-14 (1981),] to uphold the formulas by which employers compute the amount of their employees' benefits, so long as the pension plans in question satisfy ERISA's guidelines." Williams v. Caterpillar, Inc., 944 F.2d 658, 664 (9th Cir. 1991). Because the Committee's interpretation did not take away benefits Watkins had accrued, the Committee's actions did not violate §

1054.[4].

The Watkinses cite no authority for their claim that ERISA requires that WHC aggregate all of Watkins's preconsolidation service for purposes of calculating his benefits. Instead, they rely on a single sentence from the House Conference Report that accompanied ERISA: "[O]nce an employee has achieved any percentage of vesting, then all of his pre-break and post-break service must be aggregated for all purposes." H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 14 reprinted in 1974 U.S.C.C.A.N. 5038, 5051. Their reliance is misplaced, however, as the ERISA section that comes closest to embodying the "rule" described in the House Conference Report is 29 U.S.C. § 1060 --

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[4] For these same reasons, the Watkinses' arguments based on Article 19 of the HOEP Plan and § 8.1 of the Westinghouse Plan, both of which prohibit amendments that reduce an employee's accrued benefits, are without merit.

and it does not require aggregation for purposes of calculating benefits.

Section 1060 provides in pertinent part:

> For purposes of this part [2] and part 3 [of ERISA] --
>
> > (1) In any case in which the employer maintains a plan of a predecessor employer, service of such predecessor shall be treated as service for the employer . . .

29 U.S.C. § 1060(b)(1). This rule of aggregation applies only to parts 2 and 3 of ERISA, Id. §§ 1051-1086. As we said in Carver, these parts of ERISA "establish minimum requirements for participation, vesting, funding, and rate of accrual of benefits. There is nothing in these provisions relating to the amount of benefits to be calculated into the plan formula" 951 F.2d at 1088 (citations omitted).

The HOEP Plan's eligibility

provision, Article 2.2(c), aggregates all preconsolidation service, thereby complying with § 1060(b)(1). Carver makes it clear that § 1060 does not mandate that the plan calculate benefits based on complete aggregation of service. The district court properly rejected the Watkinses' ERISA claims.

III

[6] We turn now to WHC's appeal and the Watkinses' cross-appeal of the district court's equitable estoppel rulings. The district court held for the Watkinses on their equitable estoppel rulings. The district court held for the Watkinses on their equitable estoppel claim against WHC, but not against the Plan. WHC argues that the Watkinses' equitable estoppel claim has no merit in light of the Supreme Court's recent decision in Mertens v. Hewitt Associates, 113 S. Ct. 2063 (1993). We agree.

Before Mertens, we had said that "[e]ven though ERISA preempts common law theories of contract law, the principles of equitable estoppel apply to pension plans." Dockray v. Phelps Dodge Corp., 801 F.2d 1149, 1155 (9th Cir. 1986) (citation omitted); see also Carver, 951 F.2d at 1087-88; Ellenburg v. Brockway, Inc., 763 F.2d 1091, 1096 (9th Cir. 1985). At the same time, we have limited the circumstances in which an ERISA claimant may assert an equitable estoppel claim. In Davidian v. Southern California Meat Cutters Union & Food Employees Benefit Fund, 859 F.2d 134 (9th Cir. 1988), we held that an estoppel claim will not lie against a trust fund where recovery on the claim would contradict written plan provisions. Id. at 136. And in Greany v. Western Farm Bureau Life Insurance Co., 973 F.2d 812 (9th Cir. 1992), we held that "a federal

common law claim of equitable estoppel will be available only where '(a) the provisions of the plan at issue are ambiguous such that reasonable persons could disagree as to their meaning or effect, and (b) representations are made to the employee involving an oral interpretation of the plan'" Id. at 821 (emphasis added) (quoting Kane v. Aetna Life Ins., 893 F.2d 1283, 1286-87 (11th Cir.), cert. denied, 498 U.S. 890 (1990).

[7] In Mertens, the Court considered whether a non-fiduciary who knowingly participates in the breach of a fiduciary duty under ERISA can be liable for losses that a plan suffers as a result. The Court first reviewed the remedies available under § 1109(a) against fiduciaries (which WHC is in this case):

> [T]he fiduciary is personally liable for damages ("to make good to [the] plan any losses

> to the plan resulting from each such breach"), for restitution ("to restore to [the] plan any profits of such fiduciary which have been made through use of asserts of the plan by the fiduciary"), and for "such other equitable or remedial relief as the court may deem appropriate."

113 S. Ct. at 2066 (second and third alterations in original) (quoting 29 U.S.C. § 1109(a)). Because the party from whom money damages was sought in Mertens was not a fiduciary, however, the claimant sought to premise relief on § 1132(a)(3), which authorizes a participant to bring a civil action "(A) to enjoin any act or practice which violates any provision of [ERISA] or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of [ERISA] or the terms of the plan." 29 U.S.C. § 1132(a)(3). This required the Court to

interpret "appropriate equitable relief" and to decide whether it encompasses compensatory damages. The Court held that the term "other appropriate equitable relief" encompasses only the traditional forms of equitable relief, i.e., an injunction, mandamus, or restitution. 113 S. Ct. at 2068-70. The district court in this case believed that § 1132(a)(3) provides the statutory authority of the Watkinses' equitable estoppel claim. After Mertens, such a reading is untenable.[5]

Mertens requires the Watkinses to

---

[5] It makes no difference that the Watkinses' claim is equitable in nature. The Court in Mertens looked to the substance of the remedy sought (i.e., injunction versus damages) rather than the label placed on that remedy. See 113 S. Ct. at 2068 ("Although they often dance around the word, what petitioners in fact seek is nothing other than compensatory damages -- monetary relief for all losses their plan sustained as a result of the alleged breach of fiduciary duties.").

identify one of ERISA's six civil enforcement provisions that authorizes the recovery of damages on their equitable estoppel claim. They firs argue that § 1132(a)(1) provides the statutory authority. Section 1132(a)(B) authorizes actions by participants or beneficiaries "to recover benefits due ... under the terms of [the] plan, to enforce ... rights under the terms of the plan, or to clarify ... rights to future benefits under the terms of the plan[.]"[6] (Emphasis added.) However, the Watkinses' equitable estoppel claim does not seek to recover benefits "under the terms of the" HOEP Plan; rather, their theory requires the terms of the HOEP Plan to be ignored in favor of the

---

[6] Section 1132(a)(1)(A) provides for an enforcement action against administrators who refuse to comply with requests for information that ERISA requires administrators to supply.

representation made to Watkins.

Section 1132(a)(2) authorizes a civil action by "a participant . . . for appropriate relief under § 1109[.]" Section 1109, in turn, "makes fiduciaries liable for breach of [their] duties, and specifies the remedies available against them[,]" including damages. Mertens, 113 S. Ct. at 2066. But § 1132(a)(2) does not provide the authority for the Watkinses' equitable estoppel claim, since § 1108 only allows recovery that "inures to the benefit of the plan as a whole." Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 140 (1985)1 see also id. at 144 ("[T]he entire text of [§ 1109] persuades us that Congress did not intend that section to authorize any relief except of the plan itself.").

[8] Nor do ERISA's three remaining civil enforcement provisions plainly authorize the recovery of damages on the

Watkinses' equitable estoppel claim.[7] Therefore, because ERISA does not sanction the recovery of damages as the district court held, we must reverse the judgment in the Watkinses' favor.[8]

IV

The Watkinses ask for their attorney's fees on appeal pursuant to 29 U.S.C. § 1132(g)(1). This section "allows for the recovery of attorney's fees and costs incurred in an appeal regardless of the outcome." Oster v. Barco of Cal. Employees' Retirement Plan,

---

[7] Section 1132(a)(4) authorizes a suit for violation of § 1025(c), which mandates that plan administrators furnish participants with certain information contained in Internal Revenue registration statements. Sections 1132(a)(5) and (a)(6) authorize actions only by the Secretary of Labor.

[8] Our holding on WHC's appeal obviates the need to consider the Watkinses' cross-appeal of the district court's ruling that the Plan itself could not be sued under an equitable estoppel theory.

869 F.2d 1215, 1221 (9th Cir. 1988). The award of attorney's fees and costs is a matter committed to the court's discretion. 29 U.S.C. § 1132(g)(1). In exercising that discretion, we consider the following criteria:

> (1) the degree of the opposing parties' culpability or bad faith; (2) the ability of the opposing parties to satisfy an award of fees; (3) whether an award of fees against the opposing parties would deter others from acting under similar circumstances; (4) whether the parties requesting fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA; and (5) the relative legal merits of the parties' positions.

Oster, 869 F.2d at 1222 (internal quotation marks omitted).

We deny the Watkinses' request for attorney's fees. Of the factors listed in Oster, only the second cuts in favor of the request: it is undisputed that WHC can absorb the hit of a fee award.

The remaining factors either cut against the request or simply do no weigh heavily on either side of the balance. The district court specifically found that WHC did not act in bad faith. The deterrence effect of a fee award in this case would be minimal. The Watkinses brought this appeal to benefit only themselves. Finally, we have held adversely to the Watkinses on all theories they advanced.

AFFIRMED IN PART, REVERSED IN PART

Each side shall bear its own costs.

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APPENDIX H

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

GLENN D. THESENVITZ; DONALD J. HEBERLEIN, JAMES E. BERWICK, DONALD E. PALMER, KENNETH L. WILSON, FERRIN K. WALKER and NORMA STARK, PR of the Estate of LAWRENCE STARK, Dec'd.,	)	NO.
Plaintiffs,	)	COMPLAINT FOR DAMAGES
vs.	)	
KAISER ENGINEERS HANFORD COMPANY, KAISER ENGINEERS RETIREMENT PLAN, and ADMINISTRATIVE COMMITTEE FOR THE KAISER ENGINEERS HANFORD RETIREMENT PLAN,	)	
Defendants.	)	

COMES NOW the plaintiffs above-named and for cause of action herein allege as

follows:

I.

Plaintiffs Thesenvitz, Stark, Heberlein, Berwick and Wilson are residents of Benton County, Washington. Plaintiff Palmer is a resident of Yakima County, Washington. Plaintiff Walker is a resident of Spokane County, Washington.

II.

Each of the plaintiffs, with the exception of plaintiff Norma Stark, formerly was employed by the J. A. Jones Company at the Hanford Nuclear Reservation. Each of the plaintiffs, with the exception of plaintiff Norma Stark, became employees of the Kaiser Engineers Hanford Company as of March 1, 1987, at the time when a "consolidation" of Department of Energy Contractors took place at the Hanford Nuclear Reservation. Each of the plaintiffs, with the exception of plaintiff Norma Stark,

thereafter was employed by the Kaiser Engineers Hanford Company until the time of his retirement. As of the current date each of the plaintiffs, with the exception of plaintiff Norma Stark, has retired from the employment of the Kaiser Engineers Hanford Company.

Plaintiff Norma Stark brings this action on behalf of the estate of her husband, Lawrence Stark, deceased, who was formerly employed by the J. A. Jones Company and thereafter became an employee of the Kaiser Engineers Hanford Company as of March 1, 1987, and who was so employed by the Kaiser Engineers Hanford Company until the time of his retirement.

III.

Defendant Kaiser Engineers Hanford Company is a Washington corporation authorized to transact business in the State of Washington and in fact was transacting business in the State of

Washington at all times material hereto.

IV.

Defendant Kaiser Engineers Hanford Retirement Plan is an employee pension plan within the meaning of 29 USC § 1002.

V.

The Kaiser Engineers Hanford Administrative Committee is the entity which administers the Kaiser Engineers Hanford Retirement Plan. The defendant Administrative Committee is the Plan Administrator for the Retirement Plan for the purposes of ERISA, 29 USC § 1001 et. seq. The Administrative Committee is made up of three individual members who are employed by and/or appointed by the Kaiser Engineers Hanford Company to administrate the Retirement Plan.

VI.

Prior to May of 1990, the plaintiffs, including Lawrence Stark, had all retired from active employment with

the Kaiser Engineers Hanford Company. Many of the plaintiffs were encouraged to retire as part of an "Early Retirement Program" that was offered by the Kaiser Engineers Hanford Company during 1988. At the time when they retired from active employment with the Kaiser Engineers Hanford Company, each of the plaintiffs herein was a participant in, and was entitled to receive benefits under, the Kaiser Engineers Hanford Retirement Plan, with the exception of plaintiff Stark, who is bringing this action on behalf of the estate of decedent, Lawrence Stark, who was a participant in the Plan prior to his death on April 28, 1991.

VII.

Prior to the time when each of the plaintiffs retired from active employment with the Kaiser Engineers Hanford Company, the defendants made specific representations to the plaintiffs as to

the amount of pension benefits that they would be entitled to receive under the Retirement Plan if they chose to retire at that time. That is, each plaintiff was informed by the defendants that he would receive pension benefits each month in a specific dollar amount after his retirement if he chose to receive his pension benefits in the form of future monthly payments. Based upon these representations by the defendants as to the amount of pension benefits that they would be entitled to receive if they retired, the plaintiffs did in fact choose to retire even though they were not obligated to do so at the time when they retired.

VIII.

Prior to retirement from active employment with the Kaiser Engineers Hanford Company, each plaintiff was given a number of options as to how they could

choose to receive their pension benefits. Two of these options were to receive these benefits either in the form of a series of future monthly payments which were to commence after retirement, or in the form of a one time lump sum payment that was to be paid at the time of retirement. Based upon the defendants' representations to the plaintiff as to the amount of pension benefits that they would receive if they chose to accept their pension benefits in the form of future monthly payments, and based upon the defendants' representations to the plaintiffs as to the amount of pension benefits that they would receive if they chose one of the other options concerning the receipt of benefits that was available to them, the plaintiffs all chose to receive their pension benefits in the form of future monthly payments.

IX.

After the plaintiffs had retired from active employment with Kaiser Engineers Hanford Company, each of them began receiving pension benefits from the defendants in the form of monthly payments. Initially, these monthly payments were in the amount that had been represented to the plaintiffs that they would be entitled to receive upon their retirement. The plaintiffs continued to receive pension benefits in this amount for a period of a minimum of 14 months.

X.

As a result of the defendants' above-described representations and actions regarding their pension benefits, each plaintiff herein substantially and detrimentally changed his financial status and/or his employment status in reliance upon the defendants' representations and actions regarding the plaintiffs' pension benefits by choosing

to retire at a time when such retirement was not mandatory, thereby foregoing the opportunity to earn substantial wages and benefits while remaining employed by the Kaiser Engineers Hanford Company, and by making significant purchases and other financial decisions which greatly affected their lifestyle and their ability to return to the workforce at a later date.

XI.

In May of 1990, after each one of the plaintiffs had been retired from active employment with the Kaiser Engineers Hanford Company and had been receiving pension benefits from the Retirement Plan for a significant period of time in the amount that had been promised to them, they received a letter from the Kaiser Engineers Hanford Company which stated that a "mistake" had been made when the pension benefits of the

plaintiffs had been calculated at the time of their retirement. The letter went on to state that, as a result of this mistake, the plaintiffs' pension benefits would be significantly reduced when they received their pension payments in future months. Since May of 1990, the defendants have in fact significantly reduced the monthly pension payments that are received by each one of the plaintiffs herein, thus significantly impacting the plaintiffs' monthly income and their ability to support themselves.

XII.

Upon being informed by the defendants that their monthly pension benefits were going to be significantly reduced, the plaintiffs herein protested this decision by following the claims procedure that is provided for in the summary plan description for the Kaiser Engineers Hanford Retirement Plan. The

plaintiffs have now exhausted their remedies under this claims procedure, and the defendants have continued to refuse to resume making monthly pension benefit payments to the plaintiffs in the amount that had been promised to the plaintiffs at the time of their retirement, or to reimburse the plaintiffs for the damages which they have suffered as a result of the significantly reduced pension benefits which they have been receiving since May of 1990.

XIII.

Only individuals such as the plaintiffs, who chose to receive their pension benefits in the form of future monthly payments have suffered a "reduction" in their pension benefits. Similarly situated individuals who chose to receive their retirement benefits in the form of a one time lump sum payment have not had their pension benefit

reduced in any manner.

XIV.

The defendants' conduct as described in Paragraphs I through XIII above violated ERISA, 29 USC § 1001 et. seq.; violated the terms of the Retirement Plan; constitutes an improper amendment of a pension plan, again, in violation of ERISA; and, under the principles of equitable estoppel, precludes the defendants from reducing the amount of pension benefits that the plaintiffs were promised that they would receive at the time of their retirement from active employment with the Kaiser Engineers Hanford Company.

WHEREFORE, based upon the foregoing, the plaintiffs pray the court for the following relief:

1. An order determining that the conduct of the defendants as described above violated ERISA, 29 USC § 1001;

2. An order determining that the conduct of the defendants as described above violated the terms of the controlling plan document for the Retirement Plan, and therefore, once again, violated ERISA;

3. An order determining that the defendants improperly amended the Retirement Plan in a manner so as to reduce the plaintiffs' pension benefits, thus, once again, violating ERISA;

4. An order determining that the defendants are equitably estopped by their representations and actions from reducing the amount of pension benefits that the plaintiffs were promised at the time of their retirement form the employment of the Kaiser Engineers Hanford Company that they would receive during their retirement;

5. An order determining that, for the foregoing reasons, the defendants

should be ordered to immediately resume making monthly pension payments to the plaintiffs in the amount that had been promised to them at the time of their retirement, and that the defendants should be ordered to reimburse the plaintiffs for any monetary losses which they have suffered as a result of the defendants' unlawful reduction of the plaintiffs' monthly pension benefits beginning in May of 1990;

6. An order that, in the alternative, the plaintiffs may choose to receive their pension benefits in the form of one of the other options that they had available to them at the time of their retirement.

7. Plaintiff Norma Stark, as Personal Representative of the Estate of Lawrence Stark, is seeking as relief the amount of money that decedent was underpaid in pension benefits between May

of 1990 and his death on April 28, 1991, or the opportunity to elect to receive benefits in another form;

8. That the trial of this matter be heard by a jury.

9. For such other and further relief as to the Court shall seem just and equitable in this instance.

DATED: This 27th day of June, 1991.

CRITCHLOW, WILLIAMS,
SCHUSTER & MALONE
Attorneys for Plaintiffs

By: _____
Alex J. Skalbania
WSBA #15412

APPENDIX I

28 U.S.C. § 1254

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

APPENDIX J

28 U.S.C. § 1331

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

APPENDIX K

29 U.S.C. § 1001

(a) Benefit plans as affecting interstate commerce and the Federal taxing power. The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of

their participants, and the employers, employee organizations, and other entities by which they are established or maintained; that a large volume of the activities of such plans is carried on by means of the mails and instrumentalities of interstate commerce; that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantially affect the revenues of the United States because they are afforded preferential Federal tax treatment; that despite the enormous growth in such plans many employees with long years of employment are losing

anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

(b) Protection of interstate commerce and beneficiaries by requiring disclosure and reporting, setting

standards of conduct, etc., for fiduciaries. It is hereby declared to be the policy of this Act to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit pans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

(c) Protection of interstate commerce, the Federal taxing power, and beneficiaries by vesting of accrued benefits, setting minimum standards of funding, requiring termination insurance. It is hereby further declared to be the policy of this Act to Protect interstate

commerce, the Federal taxing power, and the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance.

APPENDIX L

29 U.S.C. 1102(a)

(a) Named fiduciaries. (1) Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan.

(2) For purposes of this title, the term "named fiduciary" means a fiduciary who is named in the plan instrument, or who, pursuant to a procedure specified in the plan, is identified as a fiduciary (A) by a person who is an employer or employee organization with respect to the plan or (B) by such an employer and such an employee organization acting jointly.

APPENDIX M

29 U.S.C. § 1104

(a) Prudent man standard of care.

(1) Subject to sections 403(c) and (d) [29 USCS § 1103(c) and (d)], 4042 [29 USCS § 1342], and 4044 [29 USCS § 1344], a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and --

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matter would use in the conduct of an enterprise of a like

character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title and title IV.

(2) In the case of an eligible individual account plan (as defined in section 407(d)(3) [29 USCS § 1107(d)(3)]), the diversion requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section

407(d)(4) and (5) [29 USCS § 1107(d)(4) and (5)]).

APPENDIX N

29 U.S.C. § 1109

(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 411 of this Act [29 USCS § 1111].

(b) No fiduciary shall be liable with respect to a breach of fiduciary duty under this title if such breach was committed before he became a fiduciary or

after he ceased to be a fiduciary.

APPENDIX O

29 U.S.C. § 1132

Civil enforcement.

(a) Persons empowered to bring a civil action. A civil action may be brought --

(1) by a participant or beneficiary --

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by a Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409 [29 USCS § 1109];

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of

this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title to the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 105(d) [29 USCS § 1025(c)];

(5) except as otherwise provided in subsection (b), by the Secretary (A) to enjoin any act or practice which violates any provision of this title, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this title;

(6) by the Secretary to collect any civil penalty under subsection (c)(2) or (i) or (1);

(7) by a State to enforce compliance with a qualified medical child support order (as defined in section

609(a)(2)(A) [29 USCS § 1169(a)(2)(A)]); or

(8) by the Secretary, or by an employer or other person referred to in section 101(f)(1) [29 USCS § 1021(f)(1), (A) to enjoin any act or practice which violates subsection (f) of section 101 [29 USCS § 1021(f)], or (B) to obtain appropriate equitable relief (i) to redress such violation or (ii) to enforce such subsection.

(d) Status of employee benefit plan as entity.

(1) An employee benefit plan may sue or be sued under this title as an entity. Service of summons, subpoena, or other legal process of a court upon a trustee or an administrator of an employee benefit plan in his capacity as such shall constitute service upon the employee benefit plan. In a case where a plan has not designated in the summary

plan description of the plan an individual as agent for the service of legal process, service upon the Secretary shall constitute such service. The Secretary, not later than 15 days after receipt of service under the preceding sentence, shall notify the administrator of any trustee of the plan of receipt of such service.

(2) Any money judgment under this title against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this title.

(e) Jurisdiction.

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of

civil actions under this title brought by the Secretary or by a participant, beneficiary, or fiduciary, or any person referred to in § 101(f)(1). State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section and (7) of subsection (a) of this section.

(2) Where an action under this title is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

(f) Amount in controversy; citizenship of parties. The district courts of the

United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

(g) Attorney's fees and costs; awards in actions involving delinquent contributions.

(1) In any action under this title (other than an action described in paragraph 2) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

Supreme Court, U.S.
FILED
AUG 9 1994
OFFICE OF THE CLERK

No. 94-127

In The

Supreme Court of the United States

October Term, 1994

GLENN D. THESENVITZ, et al.,

Petitioners,

v.

KAISER ENGINEERS HANFORD COMPANY, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether a participant in an ERISA pension plan may obtain benefits beyond those authorized by the unambiguous terms of the written plan, on a federal common law theory of equitable estoppel, in the absence of intent to deceive or other circumstances tantamount to fraud?

PARTIES TO THE PROCEEDING

The petition identifies the petitioners as Glenn D. Thesenvitz, Kenneth L. Wilson, Donald J. Heberlein (or Heberline), James E. Berwick, Donald E. Palmer, Ferrin K. Walker, and Norma Stark as personal representative of the Estate of Lawrence Stark. We understand that Mr. Walker is now deceased.

The petition identifies the respondents as (1) Kaiser Engineers Hanford Company, (2) Kaiser Engineers Retirement Plan, and (3) Administrative Committee for the Kaiser Engineers Hanford Retirement Plan. Only the company (now known as ICF Kaiser Hanford Co.) is a proper respondent in this Court. The district court entered judgment in favor of the other two defendants, App. A-13, and petitioners did not appeal. App. A-10. Consequently the Plan and the Administrative Committee were not parties to the appeal before the Ninth Circuit, and they are not properly before this Court.

RULE 29.1 LISTING

Respondent ICF Kaiser Hanford Co. is a wholly-owned subsidiary of ICF Kaiser International, whose shares are listed on NASDAQ.

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No. 94-127

In The

Supreme Court of the United States

October Term, 1994

GLENN R. THESENVITZ, et al.,

Petitioners,

v.

KAISER ENGINEERS HANFORD COMPANY, et al.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the district court, App. A-15 *et seq.*, is reported at 796 F. Supp. 447 (E.D. Wash. 1992). The memorandum opinion of the Ninth Circuit, App. A-6 *et seq.*, is unpublished; the disposition appears in the table at 15 F.3d 1090 (9th Cir. 1994).

STATEMENT OF THE CASE

Petitioners elected to take early retirement from the Kaiser Engineers Hanford Company. They did so on the basis of estimates by the company's pension department

as to the amount of their monthly benefits under the terms of the Company's pension plan. App. A-9.

Unfortunately these estimates were erroneous, and the errors were not caught until some 12 to 18 months after the petitioners' retirements. During this period petitioners received payments that were substantially higher than those to which they were entitled under the terms of the written plan. App. A-9.

When the errors were discovered, the plan administrator reduced petitioners' pensions to the levels authorized by the plan, as it was required to do.[1] App. A-24. Petitioners brought suit in the United States District Court for the Eastern District of Washington to obtain the higher level of benefits that they had originally received in error. The district court had jurisdiction under 29 U.S.C. § 1132.

The district court found that the reduced pensions were all that petitioners were entitled to receive under the terms of the written plan. App. A-38 to A-39. Accordingly the court dismissed the claims against the plan and its administrative committee. App. A-14. Petitioners did not appeal. App. A-10.

The district court also found that the company did not deliberately mislead the petitioners as to the amount of their benefits. App. A-22, A-28 n.3. However the petitioners were nevertheless allowed to recover against the company on a theory of equitable estoppel, under the

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[1] Title 29 U.S.C. § 1104(a)(1)(D) requires that an ERISA plan be administered in accordance with the terms of the governing documents.

federal common law. App. A-39. The company appealed. The court of appeals had jurisdiction of the appeal under 28 U.S.C. § 1291.

The Ninth Circuit reversed on the authority of its earlier decision in *Watkins v. Westinghouse Hanford Co.*, 12 F.3d 1517 (9th Cir. 1993), which presented similar facts. App. A-11 to A-12. On the basis of this Court's decision in *Mertens v. Hewitt Associates*, 124 L. Ed. 2d 161 (1993), *Watkins* held that ERISA participants may not obtain benefits in excess of those authorized by a written plan, on a theory of equitable estoppel or otherwise, as there is no statutory authority for such claims. App. A-98 to A-105.

REASONS FOR DENYING THE WRIT

The decision below is correct, and is compelled by this Court's decisions in *Mertens v. Hewitt Associates*, 124 L. Ed. 2d 161 (1993), *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41 (1987), and *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134 (1985).

There is no conflict among the circuits as to the availability of estoppel on the facts of this case, and there is no conflict among the circuits as to the impact of *Mertens* on common-law estoppel claims in ERISA cases generally. Other circuits that expressed limited receptivity to such claims prior to *Mertens* have not re-examined their position in light of *Mertens*. Even in these circuits, petitioners would not have prevailed on the facts of this case. Thus there is no conflict requiring resolution by this Court.

ARGUMENT

In *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985), this Court held that the "carefully integrated civil enforcement provisions" of ERISA are "strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly." Two years later, in *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987), the Court repeated that the express civil remedies of 29 U.S.C. § 1132(a) "were intended to be exclusive."

Some courts of appeals took this Court at its word. They held that there was no federal common-law remedy in the nature of equitable estoppel in ERISA cases.[2] These courts also noted that ERISA's requirement that plans be in writing, with formal amendment procedures, 29 U.S.C. § 1102, precluded use of oral representations or informal written communications to expand or modify the benefits due participants under the terms of the written plan.

As petitioners note, Pet. 10-14, other circuits were reluctant to rule out equitable estoppel claims altogether. However virtually all of these cases preceded this Court's decision in *Mertens v. Hewitt Associates, Inc.*, 124 L. Ed. 2d 161 (1993).[3]

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[2] *E.g., Alexander v. Anheuser-Busch Companies, Inc.*, 990 F.2d 536 (10th Cir. 1993); *Lee v. E.I. DuPont de Nemours & Co.*, 894 F.2d 755, 757 (5th Cir. 1990).

[3] Except in the Ninth Circuit, the few estoppel cases decided after *Mertens* have not considered the effect of *Mertens* on the prior law of the circuit. For instance, *Tregoning v. American Community Mutual Ins. Co.*, 12 F.3d 79 (6th Cir. 1993), cited by petitioners, rejected the estoppel claim as not even meeting

Mertens removed all doubt as to the availability of implied or common-law causes of action in ERISA cases. *Mertens* made clear that plaintiffs in such cases must find express statutory authorization for their claims. "The issue is whether the statute affirmatively *authorizes* such a suit." *Id.*, 124 L. Ed. 2d at 169 n.5. "The authority of courts to develop a 'federal common law' under ERISA . . . is not the authority to revise the text of the statute." *Id.*, at 172.

In the court below, petitioners asserted that authorization for their claims could be found in 29 U.S.C. §§ 1132(a)(1)(B) and 1132(a)(3)(B). App. A-11. However the former is expressly limited to claims for benefits due under the terms of the plan.[4] The latter is limited to claims for "appropriate equitable relief"[5] – a term that *Mertens* authoritatively construed to mean injunctions, constructive trusts, and similar remedies as opposed to damages. 124 L. Ed. 2d, at 169.[6] Neither provision authorizes the relief sought by petitioners.

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the requirements of the circuit's pre-*Mertens* decisions. The *Tregoning* court did not have occasion to consider the impact of *Mertens* on those decisions, and it did not do so.

[4] "[A civil action may be brought by a participant or beneficiary] to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan."

[5] "[A civil action may be brought] by a participant, beneficiary, or fiduciary . . . to obtain other appropriate equitable relief (i) to redress such violations [of ERISA] or (ii) to enforce any provisions of this subchapter or the terms of the plan."

[6] In addition, as in *Mertens*, here there was no violation either of ERISA or of the terms of the plan, as 29 U.S.C. § 1132(a)(3)(B) expressly requires.

In *Watkins v. Westinghouse Hanford Co.*, 12 F.3d 1517 (9th Cir. 1993), the court below correctly held that *Mertens* required modification of the circuit's pre-*Mertens* decisions that had shown a limited willingness to accept estoppel claims in ERISA cases as a matter of federal common law. *See* App. A-98 to A-105. The other circuits have yet to consider the effect of *Mertens* on such claims. There is no conflict on that point.

Even before the decision in *Mertens*, there was no conflict on the facts of this case. Most of the expressions on which petitioners rely were simply cautious statements by a court limiting its holding to the facts before it, or remanding for development of a fuller factual record before deciding the validity of plaintiff's legal theory.[7] None of the cases cited in the petition actually upheld an award of damages to participants under a theory of estoppel.

Some of these cases stated, frequently in dictum, that equitable estoppel might be available in cases of "intentional deceit" or conduct "tantamount to fraud";[8] or that although equitable estoppel could not expand participants' rights under an unambiguous plan, it might be available to prevent a plan administrator from adopting

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[7] In particular, *Fischer v. Philadelphia Elec. Co.*, 994 F.2d 130 (3d Cir.), *cert. denied*, 126 L. Ed. 2d 586 (1993), remanded the estoppel claim "without in any way suggesting a view on the merits." 994 F.2d at 136.

[8] *Sutter v. BASF Corp.*, 964 F.2d 556 (6th Cir. 1992); *Moore v. Metropolitan Life Ins. Co.*, 856 F.2d 488, 489 (2d Cir. 1988).

inconsistent interpretations of an ambiguous plan;[9] or that equitable estoppel might be available in cases involving unfunded welfare plans, as opposed to actuarially funded pension plans.[10]

Even if these expressions remain viable after *Mertens*, which we doubt, none of them would justify a finding for plaintiffs here. This case seeks benefits in excess of those authorized by an existing written pension plan, not an unfunded welfare plan or an unwritten plan or a plan to be adopted at some future time. The error in calculating petitioners' pensions resulted from a confusion of monthly and annual figures in a worksheet, and not from any ambiguity in the written plan. App. A-21 to A-22. The trial court expressly found that the company had no intent to deceive. App. A-22. Thus respondents would prevail even under the cases from other circuits cited by petitioners. On the facts of this case, there is no conflict.

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[9] *Novak v. Irwin Yacht & Marine Corp.*, 986 F.2d 468 (11th Cir. 1993); *Greany v. Western Farm Bureau Life Ins. Co.*, 973 F.2d 812 (9th Cir. 1992).

[10] *Armistead v. Vernitron Corp.*, 944 F.2d 1287 (6th Cir. 1991); *Black v. TIC Investment Corp.*, 900 F.2d 112 (7th Cir. 1990). *See also Elmore v. Cone Mills Corp.*, 23 F.3d 855, 868-869 (4th Cir. 1994) (concurring opinion) (although estoppel principles cannot be used to effect a modification of an existing ERISA plan, a company may be estopped by its promise as to the terms of a plan to be adopted in the future).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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